And of [illegible] AND 01/100 Dollars, Premium,

Does Insure JOHN CLAY hereinafter called the Assured,

Whose address is 1250 LAKE SHORE DRIVE, CHICAGO, ILLINOIS

from the 22nd day of APRIL 19 52, at noon, to the 22nd day of APRIL 19 55, at noon, Standard Time at place of issuance, to an amount not exceeding

[illegible] Dollars,

on the following described property:

PROPERTY COVERED

1. Personal property owned, used or worn by the person in whose name this Policy is issued and members of the Assured's family of the same household, while in all situations, except as hereinafter provided.

PERILS INSURED

2. All risks of loss of or damage to property covered except as hereinafter provided.

AMOUNTS OF INSURANCE

3. Insurance attaches only with respect to those items in this paragraph for which an amount is shown and only for such amount.

ITEMS	AMOUNT	
(a)	$ 32,000.00	On unscheduled personal property, except as hereinafter provided.
(b)	$ 22,350.00	On personal jewelry, watches, furs, fine arts and other property as per schedules attached hereto. Each item considered separately insured.
(c)	$ NIL	On unscheduled personal jewelry, watches and furs in addition to the amount of $250. provided in paragraph 5(b), against fire and lightning only.
TOTAL	$ 54,350.00	

(See Other Side for Paragraphs 4, 5 and 6)

DECLARATIONS OF THE ASSURED

7. The following are the approximate values of the unscheduled personal property, other than jewelry, watches and furs, as estimated by the Assured, at the time of issuance of this Policy:

	Wherever Located	(Of which the following amounts involve personal property ordinarily situated throughout the year at residences other than principal residence.)
(a) Silverware and pewter	$ 2,200.00	($ 40.00)
(b) Linens (including dining room and bedroom)	$ 1,500.00	($ 50.00)
(c) Clothing (Men's, Women's, Children's)	$ 6,000.00	($ 150.00)
(d) Rugs (including floor coverings) and draperies	$ 2,250.00	($ NIL)
(e) Books	$ 100.00	($ NIL)
(f) Musical Instruments (including pianos)	$ 1,500.00	($ NIL)
(g) Television sets, radios, record players and records	$ 650.00	($ NIL)
(h) Paintings, etchings, pictures and other objects of art	$ 1,500.00	($ 50.00)
(i) China and glassware (including bric-a-brac)	$ 2,000.00	($ 50.00)
(j) Cameras and Photographic equipment	$ 650.00	($ NIL)
(k) Golf, hunting, fishing and other sports and hobby equipment	$ 1,100.00	($ NIL)
(l) Refrigerators, washing machines, stoves, electrical appliances and other kitchen equipment	$ 570.00	($ 30.00)
(m) Bedding (including blankets, comforters, covers, pillows, mattresses, and springs)	$ 1,500.00	($ 200.00)
(n) Furniture (including tables, chairs, sofas, desks, beds, chests, lamps, mirrors, clocks)	$11,000.00	($1,500.00)
(o) All other personal property (including wines, liquors, foodstuff, garden and lawn tools and equipment, trunks, traveling bags, children's playthings, miscellaneous articles in basement and attic) and professional equipment, if any, covered under paragraph 6(b)	$ 2,950.00	($ 100.00)
TOTAL	$36,600.00	($2,170.00)

NOTE: If the total value ordinarily situated throughout the year at residences other than the principal residence exceeds ten per cent of the amount of the insurance granted under Item (a) Paragraph 3, such excess value is not insured hereunder unless specifically endorsed hereon.

Countersigned this 22nd day of APRIL 1952 at CHICAGO, ILLINOIS

BARTHOLOMAY & CLARKSON, General Agent

By John L. Clarkson

Form 630-I - 1100 9 50 82776 - Printed in U.S.A.

[fol. 3a]

EXHIBIT A TO COMPLAINT

3

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 470

JOHN CLAY, PETITIONER,

vs.

SUN INSURANCE OFFICE, LIMITED.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 16, 1963
CERTIORARI GRANTED DECEMBER 2, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 470

JOHN CLAY, PETITIONER,

vs.

SUN INSURANCE OFFICE, LIMITED.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 2]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

JOHN CLAY, Plaintiff,

vs.

SUN INSURANCE OFFICE LIMITED, a corporation organized under the laws of Great Britain, authorized to transact business in Florida.

COMPLAINT—Filed May 20, 1957

(1) Plaintiff is a citizen of the state of Florida residing at 1614 Brickel Drive, Fort Lauderdale and defendant is a corporation incorporated under the laws of the United Kingdom of Great Britain, but authorized to transact business in the State of Florida. The matter in controversy exceeds, exclusive of interest and cost, the sum of $3,000.00.

(2) On April 22, 1952, defendant for a premium of $966.01 paid by plaintiff executed and delivered to plaintiff its Personal Property Floater Policy insuring the plaintiff against theft and destruction of his property, said policy being No. 7 P.P. F. 117120, a copy of which is attached as Exhibit A, whereby defendant agreed to insure plaintiff for the term of 3 years beginning from the 22nd day of April, 1952 until the 22nd day of April, 1955, at noon, standard time. The policy insured against loss or damages the personal property stolen from the plaintiff, wherever located.

(3) While such contract of insurance was in full force and effect and on or about January 1, 1955 and while the plaintiff was living at J-C Ranch in Palm Beach County near Lake Harbor, Florida, plaintiff was robbed of certain personal property consisting of silverware, mens clothing, books and hunting equipment having a value of $9,000.00 and a painting of 4 generations of the Clay family, of a value of approximately $3,500.00 was slashed and partially

[fol. 3] destroyed, said painting being insured under the terms of the above-referred-to policy.

(4) Plaintiff has duly performed all the conditions of such policy on his part.

(5) Plaintiff duly notified the defendant of the robbery and loss sustained by the plaintiff thereby, and of the damages of the said painting and within the time specified in the policy of insurance caused to be served upon the defendant at the office of its agent, Bartholomay & Clarkson, 175 West Jackson Boulevard, Chicago 4, Illinois, due and proper proofs of loss which were duly received and retained by the defendant.

(6) Defendant has failed and refused to pay any part of this loss of $13,500.00 to plaintiff.

Wherefore, plaintiff demands judgment against defendant for the sum of $13,500.00, interest and cost. Plaintiff demands trial by jury.

Gibson & Gibson, By Paschal C. Reese, Attorneys for the Plaintiff, 209 South Olive Avenue, West Palm Beach, Florida.

Duly sworn to by Paschal C. Reese, jurat omitted in printing.

ILLINOIS

PERSONAL PROPERTY FLOATER POLICY
(World Wide)

Policy No. 7 P.P.F. 117120

FOUNDED A. D. 1710

Sun Insurance Office
LIMITED

WM. H. McGEE & CO., INC.
MANAGERS MARINE DEPARTMENT
111 JOHN STREET, NEW YORK 7, N. Y.
BARTHOLOMAY & CLARKSON, General Agent
175 West Jackson Boulevard, Chicago 4, Ill.

556.60
120.00 DED. Cr.
436.60 3(a)
522.41 3(b)

AMOUNT $ 54,350.00 Rate _____ Premium $ 966.01

~~The building(s) in which the Assured resides, located at _____ is or are of _____ construction and the policy charged for this Policy is predicated upon such construction.~~

In consideration of the stipulations herein named

And of ---NINE HUNDRED SIXTY SIX AND 01/100--- Dollars, Premium,
Does Insure JOHN CLAY hereinafter called the Assured,
Whose address is 1250 LAKE SHORE DRIVE, CHICAGO, ILLINOIS
from the 22nd day of APRIL 1954, at noon, to the 22nd day of APRIL 1955,
at noon, Standard Time at place of issuance, to an amount not exceeding
---FIFTY FOUR THOUSAND THREE HUNDRED FIFTY AND 00/100--- Dollars,
on the following described property:

PROPERTY COVERED

1. Personal property owned, used or worn by the person in whose name this Policy is issued and members of the Assured's family of the same household, while in all situations, except as hereinafter provided.

PERILS INSURED

2. All risks of loss of or damage to property covered except as hereinafter provided.

AMOUNTS OF INSURANCE

3. Insurance attaches only with respect to those items in this paragraph for which an amount is shown and only for such amount.

ITEM	AMOUNT	
(a)	$ 32,000.00	On unscheduled personal property, except as hereinafter provided.
(b)	$ 22,350.00	On personal jewelry, watches, furs, fine arts and other property as per schedules attached hereto. Each item considered separately insured.
(c)	$ NIL	On unscheduled personal jewelry, watches and furs in addition to the amount of $250. provided in paragraph 5(b), against fire and lightning only.
TOTAL	$ 54,350.00	

(See Other Side for Paragraphs 4, 5 and 6)

DECLARATIONS OF THE ASSURED

7. The following are the approximate values of the unscheduled personal property, other than jewelry, watches and furs, as estimated by the Assured, at the time of issuance of this Policy:

(Of which the following amounts involve personal property ordinarily situated throughout the

[fo]

EXTENSIONS

4 (a) Subject otherwise to all of the conditions of this Policy, Item (a) Paragraph 3, includes, at the sole option of the Assured, personal property of others while on the premises of the residences of the Assured, and personal property of servants while they are actually engaged in the service of the Assured and while in the physical custody of such servants outside such residences;

(b) The Company will also pay the actual loss of or damage (except by fire) to property of the Assured not specifically excluded by this Policy caused by theft or attempt thereat; or by vandalism or malicious mischief to the interior of the residences of the Assured;

but in no event shall the Company's combined liability for loss or damage covered under this Paragraph 4 and for insurance attaching under Item (a) Paragraph 3, exceed the amount of insurance shown in Item (a) Paragraph 3.

(c) Automatic Reinstatement of Losses. The following clause shall apply to unscheduled personal property covered hereunder: It is understood that the amount of insurance hereunder shall be reduced by the amount of any loss covered by this Policy, but the Company and the Assured shall be deemed to have agreed that the full amount insured be reinstated automatically in the event of loss and that a pro rata additional premium is payable from the date of the loss, if the entire amount of the loss exceeds $250.00.

LIMITATIONS

5 (a) As respects unscheduled personal property ordinarily situated throughout the year at residences other than the principal residence of the Assured, the Company shall not be liable in excess of ten per cent of the amount of insurance set forth in Item (a) Paragraph 3.

(b) As respects any one loss of unscheduled jewelry, watches and furs, the Company shall not be liable for more than $250.00 unless the loss is covered under Item (c) Paragraph 3, in which event the Company's liability for such loss is limited to the amount stated therein.

(c) As respects any one loss of money including numismatic property, the Company shall not be liable for more than $100. As respects any one loss of notes, securities, stamps including philatelic property, accounts, bills, deeds, evidences of debt, letters of credit, passports, documents and railroad and other tickets, the Company shall not be liable for more than $500.

EXCLUSIONS

6. This Policy does not insure

(a) animals; automobiles, motorcycles, aircraft, boats or other conveyances (except bicycles, tricycles, baby carriages, invalid chairs and similar conveniences), or their equipment or furnishings except when removed therefrom and actually on the premises of residences of the Assured; property of any Government or subdivision thereof;

(b) unscheduled property pertaining to a business, profession or occupation of the persons whose property is insured hereunder, excepting professional books, instruments and other professional equipment owned by the Assured while actually within the residences of the Assured;

(c) against breakage of eye glasses, glassware, statuary, marbles, bric-a-brac, porcelains and similar fragile articles (jewelry, watches, bronzes, cameras and photographic lenses excepted), unless occasioned by theft or attempt thereat, vandalism or malicious mischief, or by fire, lightning, windstorm, earthquake, flood, explosion, falling aircraft, rioters, strikers, collapse of building, accident to conveyance or other similar casualty, nor unless likewise occasioned, against marring or scratching of any property not specifically scheduled herein;

(d) against mechanical breakdown; against loss or damage to electrical apparatus caused by electricity other than lightning unless fire ensues and then only for loss or damage by such ensuing fire;

(e) against wear and tear; against loss or damage caused by dampness of atmosphere or extremes of temperature unless such loss or damage is directly caused by rain, snow, sleet, hail, bursting of pipes or apparatus; against deterioration, moth, vermin and inherent vice; against damage to property (watches, jewelry and furs excepted) occasioned by or actually resulting from any work thereon in the course of any refinishing, renovating or repairing process;

(f) property on exhibition at Fairgrounds or on the premises of any National or International Exposition unless such premises are specifically herein described;

(g) against loss or damage caused by or resulting from:

(1) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack, (a) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or (b) by military, naval or air forces; or (c) by an agent of any such government, power, authority or forces;

(2) any weapon of war employing atomic fission or radioactive force whether in time of peace or war;

(3) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or Customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

7. DECLARATIONS OF THE ASSURED (See Face)

8. Unless otherwise endorsed hereon, no other insurance against the risks hereby insured is permitted on the property covered hereunder except as to property described under Paragraphs 4(a) and (b), 5(b) and (c), 6 (a) and (b). If at the time of loss or damage, there is any other valid and collectible insurance which would attach on the property described in Paragraphs

[fol. 3b]

(b) unscheduled property pertaining to a business, profession or occupation of the persons whose property is insured hereunder, excepting professional books, instruments and other professional equipment owned by the Assured while actually within the residences of the Assured;

(c) against breakage of eye glasses, glassware, statuary, marbles, bric-a-brac, porcelains and similar fragile articles (jewelry, watches, bronzes, cameras and photographic lenses excepted), unless occasioned by theft or attempt thereat, vandalism or malicious mischief, or by fire, lightning, windstorm, earthquake, flood, explosion, falling aircraft, rioters, strikers, collapse of building, accident to conveyance or other similar casualty, nor unless likewise occasioned, against marring or scratching of any property not specifically scheduled herein;

(d) against mechanical breakdown; against loss or damage to electrical apparatus caused by electricity other than lightning unless fire ensues and then only for loss or damage by such ensuing fire;

(e) against wear and tear; against loss or damage caused by dampness of atmosphere or extremes of temperature unless such loss or damage is directly caused by rain, snow, sleet, hail, bursting of pipes or apparatus; against deterioration, moth, vermin and inherent vice; against damage to property (watches, jewelry and furs excepted) occasioned by or actually resulting from any work thereon in the course of any refinishing, renovating or repairing process;

(f) property on exhibition at Fairgrounds or on the premises of any National or International Exposition unless such premises are specifically herein described;

(g) against loss or damage caused by or resulting from:

(1) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack, (a) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or (b) by military, naval or air forces; or (c) by an agent of any such government, power, authority or forces;

(2) any weapon of war employing atomic fission or radioactive force whether in time of peace or war;

(3) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or Customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

7. DECLARATIONS OF THE ASSURED (See Face)

8. Unless otherwise endorsed hereon, no other insurance against the risks hereby insured is permitted on the property covered hereunder except as to property described under Paragraphs 4(a) and (b), 5(b) and (c), 6 (a) and (b). If at the time of loss or damage, there is any other valid and collectible insurance which would attach on the property described in Paragraphs 4(a) and (b), 5(b) and (c), 6(a) and (b) had this Policy not been effected, then this insurance shall apply only as excess insurance over all such other insurance and in no event as contributing insurance.

[fol. 3b]

GENERAL CONDITIONS

Valuation Clause:—This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost to repair or replace the same with material of like kind and quality.

It is understood and agreed that, in the event of loss of or damage to any article or articles which are a part of a set, the measure of loss or damage to such article or articles shall be a reasonable and fair proportion of the total value of the set, giving consideration to the importance of said article or articles; but in no event shall such loss or damage be construed to mean total loss of set.

In case of loss or injury to any part of the insured property consisting, when complete for sale or use, of several parts, this Company shall only be liable for the insured value of the part lost or damaged.

Appraisal Clause:—If the Assured and the Company fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty days after receipt of proof of loss by the Company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request of the Assured or the Company, such umpire shall be selected by a judge of a court of record in the state in which such appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss, and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The Assured and the Company shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The Company shall not be held to have waived any of its rights by any act relating to appraisal.

Bailee Clause:—This insurance shall in no wise inure directly or indirectly to the benefit of any carrier or other bailee.

Notice of Loss Clause:—The Assured shall as soon as practicable report to this Company or its agent every loss or damage which may become a claim under this Policy and shall also file with the Company or its agent within ninety (90) days from date of loss a detailed sworn proof of loss. Failure by the Assured to report the said loss or damage and to file such sworn proof of loss as hereinbefore provided shall invalidate any claim under this Policy for such loss.

Sue and Labor Clause:—In case of loss or damage, it shall be lawful and necessary for the Assured, his or their factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof without prejudice to this insurance; nor shall the acts of the Assured or this Company, in recovering, saving and preserving the property insured in case of loss or damage, be considered a waiver or an acceptance of abandonment; to the charge whereof this Company will contribute according to the rate and quantity of the sum herein insured.

3a

Examination Under Oath Clause:—The Assured shall submit, and so far as is within his or their power shall cause all other persons interested in the property and members of the household and employees to submit, to examinations under oath by any persons named by the Company, relative to any and all matters in connection with a claim and subscribe the same; and shall produce for examination all books of account, bills, invoices, and other vouchers or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representatives, and shall permit extracts and copies thereof to be made.

Misrepresentation and Fraud Clause:—This Policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Payment of Loss Clause:—All adjusted claims shall be paid or made good to the Assured within sixty (60) days after presentation and acceptance of satisfactory proof of interest and loss at the office of this Company.

No loss shall be paid hereunder if the Assured has collected the same from others.

Subrogation Clause:—In the event of any payment under this Policy the Company shall be subrogated to all the Assured's rights of recovery therefor against any person or organization and the Assured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Assured shall do nothing after loss to prejudice such rights.

Suit Clause:—No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the state within which this Policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein.

Cancelation Clause:—This Policy may be canceled by the Assured by mailing to the Company written notice stating when thereafter such cancelation shall be effective. This Policy may be canceled by the Company by mailing to the Assured at the address shown in this Policy or last known address written notice stating when not less than five (5) days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the Assured or by the Company shall be equivalent to mailing.

If the Assured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the Assured.

Schedules and Endorsements
To Be Attached Here

BARTHOLOMAY & CLARKSON AGENT

IM 2223
(Ed. 12-27-45)

PERSONAL PROPERTY INSURANCE
($25.00 or $15.00 Deductible Clause)

Attached to and forming part of Policy Number 7 F 7160 issued to JOHN CLAY

by JON INSURANCE OFFICE, INC. at its Agency

located (city and state) CHICAGO, ILLINOIS Date of Endorsement DEC. 1, 1955

Each claim for loss or damage (separately occurring) to unscheduled property shall be adjusted separately and from the amount of each such adjusted claim or the applicable limit of liability, whichever is less, the sum of $25.00 (INSERT $25.00 OR $15.00) shall be deducted. Such deductible shall not apply, however, to loss or damage by fire, lightning, windstorm, cyclone, tornado, hail, explosion, riot, riot attending strike, smoke, damage by vehicles or aircraft, burglary or hold-up.

"Burglary" as used in this endorsement means the felonious abstraction of the insured property from within a building or room by any person or persons making felonious entry therein by actual force and violence of which there shall be visible marks made upon the exterior of such premises at the place of such entry by tools, explosives, electricity or chemicals.

All other terms and conditions of this policy remain unchanged. BARTHOLOMAY & CLARKSON, AGENT Agent.

By John L. Clarkson

AUTHENTICATED

[fol. 3c]

of 1%. The Company shall be equivalent to filing.

If the Assured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the Assured.

Schedules and Endorsements
To Be Attached Here

BARTHOLOMAY & CLARKSON AGENT

BM 2223
(Ed. 12-27-45)

PERSONAL PROPERTY INSURANCE
($25.00 or $15.00 Deductible Clause)

Attached to and forming part of Policy Number 7-F-7150 issued to
JOHN CAY
by JOHN INSURANCE OFFICE, Inc. at its Agency
located (city and state) CHICAGO, ILLINOIS Date of Endorsement April 22nd 1952

Each claim for loss or damage (separately occurring) to unscheduled property shall be adjusted separately and from the amount of each such adjusted claim or the applicable limit of liability, whichever is less, the sum of 25.00 (INSERT $25.00 OR $15.00) shall be deducted. Such deductible shall not apply, however, to loss or damage by fire, lightning, windstorm, cyclone, tornado, hail, explosion, riot, riot attending strike, smoke, damage by vehicles or aircraft, burglary or hold-up.

"Burglary" as used in this endorsement means the felonious abstraction of the insured property from within a building or room by any person or persons making felonious entry therein by actual force and violence of which there shall be visible marks made upon the exterior of such premises at the place of such entry by tools, explosives, electricity or chemicals.

All other terms and conditions of this policy remain unchanged.

BARTHOLOMAY & CLARKSON, AGENT
Agent.
By John L. Clarkson

AUTHENTICATED

[fol. 3c]

This Policy is made and accepted subject to the foregoing stipulations and conditions which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provisions or conditions of this Policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the Assured unless so written or attached.

Provisions required by law to be stated in this Policy:—This Policy is in a stock corporation.

IN WITNESS WHEREOF, this Company has executed and attested these presents, but this Policy shall not be valid unless countersigned on the declarations page by Wm. H. McGEE & CO., Inc., or a duly authorized agent of this Company.

Wm. H. McGEE & CO., Inc., Managers Marine Department

H. Clarkson PRESIDENT

22nd APRIL 52 CHICAGO, ILLINOIS

5

In Event of Loss or Damage

Immediately notify the Agent who issued this policy, or the nearest office of this Company listed below:

Wm. H Gee & Co., Inc.
MANAG MARINE DEPARTMENT
111 JOHN S T, NEW YORK 7, N. Y.

BALTIMORE 2:
Jarrett Building, South & Redwood Sts.

BOSTON 9:
14 State Street

CHICAGO 4:
175 West Jackson Boulevard

COLUMBUS 15, O.:
101 High-Long Building, 5. E. Long St.

DALLAS 1:
Gilbert Easley, Correspondent,
112 National City Building

HOUSTON 2:
Chas D. Bailey, Correspondent,
We Building

LOS ANGELES 13:
548 s. Spring Street

NEW ORLEANS 12:
111 Tulane Avenue

PHILADELPHIA 6:
Pulc Ledger Building

SAN FRNCISCO 4:
30 California Street

SEATTL 4:
14(Dexter Horton Building,
Second & Cherry Sts.

TAMPA
405 Tallace S Annex

ILLINOIS

Policy No. 7 P.P.F. 117120

ASSURED JOHN CLAY

FROM APRIL 22, 1952

TO APRIL 22, 1955

PERSONAL PROPERTY FLOATER POLICY

Sun Insurance Office
LIMITED

FOUNDED A.D. 1710

WM. H. McGEE & CO., INC.
MANAGERS MARINE DEPARTMENT
111 JOHN STREET, NEW YORK 7, N. Y.

BARTHOLOMAY & CLARKSON
General Agents
175 West Jackson Boulevard
Chicago 4, Ill.
Tel. Wabash 0163

FINE ARTS RIDER NO. 1

(One Location)

Attached to and forming part of Policy Number 7rrr117120 issued to

JOHN CRAY

by SUN INSURANCE OFFICES, LTD. of its Agency

located (city and state) CHICAGO, ILLINOIS Date of Endorsement APRIL 22, 1952

This insurance covers the property insured hereunder while on exhibition or otherwise

(a) at 1250 LAKE SHORE DRIVE, CHICAGO, ILLINOIS, and

(b) elsewhere within the limits of the Continental United States and Canada (excluding the premises of fair grounds or of any national or international exposition unless endorsed hereon) for not exceeding 10% of the aggregate amount of the schedule, but in event the amount at risk exceeds 10%, notice shall be given this Company within 72 hours from time of leaving location specified in (a) above and additional premium paid, if required.

All other terms and conditions of this policy remain unchanged.

BARTHOLOMAY & CLARKSON, AGENT

BY John F. Clarkson Agent

AUTHENTICATED

BARTHOLOMAY CLARKSON, AGENT

ITEM NO.	ARTICLE	AMOUNT INSURED
1.	ONE 22" X 35" NUMBER 657 "LAGO MAGGOIRE", THE ITALIAN MODERN 19th CENTURY, BY J. B. PYNE, 1865.	$ 200.00
2.	ONE 22" X 31" "GARDEN AND PATIO", BY V. RICARDO, ITALIAN.	200.00
3.	ONE 16" X 20" LANDSCAPE WITH CATTLE.	50.00
4.	ONE 11" X 14" LANDSCAPE, STREAM THROUGH WOODS.	25.00
5.	ONE WINTER SNOW SCENE WITH THATCH HOUSE	25.00
6.	ONE WINTER IN THE WOODS BY C. HANAH WITH A HAND CARVED FRAME	300.00
		$ 800.00

APP. 11-24-48 BY LEO A. MARZOLO,
1012 N. DEARBORN ST., CHICAGO 10, ILLINOIS

Wm. H. McGEE & CO., Inc.
Form 1316B 20M 4-48 80337 Printed in U.S.A.

[fol. 3e]

ITEM NO.	ARTICLE	AMOUNT INSURED
	FUR SCHEDULE	
1.	ONE ERMINE 3/4 LENGTH CAPE	$ 800.00
2.	ONE PERSIAN LAMB COAT AND HOOD	1,200.00
3.	ONE MINK COAT	2,000.00
4.	ONE SILVER BLUE MINK STOLE	1,000.00
	FUR TOTAL	$5,000.00
	#4 APP. 5-4-50 BY MARSHALL FUR CO., 39 SO. STATE ST., CHICAGO 3, ILLINOIS	
	JEWELRY SCHEDULE	
1.	ONE LADIES' 14K YELLOW GOLD RING, 1 LARGE DIAMOND SET IN PLATINUM BEZEL 6.10 CT., GOOD QUALITY AND 24 ORIENTAL CALIBRE RUBIES SET AROUND DIAMOND IN PEAR SHAPE DESIGN. IN CENTER OF RUBY DESIGN ARE 12 SMALL DIAMONDS ALL GOOD QUALITY	$10,000.00
2.	ONE PAIR OF LARGE LEAF DESIGNED EARRINGS, 14K PINK GOLD AND PLATINUM TRIM FOR DIAMONDS. [illegible] WITH 2 DIAMONDS ABOUT .50 CT., 8 SMALL DIAMONDS AND ORIENTAL RUBIES	350.00
3.	ONE 17J ETERNA WATCH IN 14K WHITE GOLD CASE SET IN CENTER OF 14 KT. YELLOW GOLD 1[illegible]IDE TAPERED TO 1" ON THE BOTTOM BRACELET AND 2 SMA[illegible]IAMONDS SET IN CASE, PLATINUM ORNAMENT SET ON EACH [illegible]DE OF WATCH WITH 1 LARGE DIAMOND WEIGHING ABOUT .3[illegible] CT. [illegible]D 22 SMALLER DIAMONDS, 12 RUBIES ON EACH SIDE OF WATCH. (24 DIAMONDS AND 12 RUBIES)	2,000.00
4.	ONE LADIES DIAMOND RING, PLATINUM HANDMADE MOUNTING SET WITH ONE CENTER TRIANGLE DIAMOND, BLUE WHITE, 3 CTS., AND 2 SIDE MARQUISE DIAMONDS, BLUE WHITE .75 CTS. EACH	4,200.00
	JEWELRY TOTAL	$16,550.00
	#1 APP., 11-26-48, #2 APP. 11-18-48 BY I. L. HELLER, 55 E. WASHINGTON ST., CHICAGO, #3 APP. 2-3-49 BY I. L. HELLER #4 APP. 5-1-52 BY AMERICAN DIAMOND SYNDICATE, BY EDGAR M. ZIMMERMAN, 37 S. WABASH AVE., CHICAGO.	

[fol. 4] IN THE UNITED STATES DISTRICT COURT

ANSWER—Filed June 12, 1957

The Defendant, for answer to the Complaint, says:

1. In answering Paragraph 1, the defendant admits that it is a corporation incorporated under the laws of Great Britain and authorized to do business in Florida, but generally denies the remaining allegations contained therein.

2. In answering Paragraph 2, the defendant admits the issuance of Policy No. 7 P.P.F. 117120, with said effective dates of coverage, and further admits that Exhibit A is a [fol. 5] copy of the original of said policy. In further answering said paragraph, the defendant denies the remaining allegations, but says that the policy sued upon is a Personal Property Floater Policy, commonly referred to as an inland Marine Policy, insuring against all risks of loss or damage.

3. In answering Paragraph 3, the defendant denies the same.

4. In answering Paragraph 4, the defendant denies the same.

5. In answering Paragraph 5, the defendant denies the same.

6. In answering Paragraph 6, the defendant admits the same.

By way of affirmative defenses, the defendant says:

7. By the terms and conditions of the policy of insurance sued upon it says this:

"Suit Clause: No suit, action or proceeding for the recovery of any claim under this policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the assured of the occurrence which gives rise to the claim. Provided, however, that if by the Laws of the state within which this Policy is issued such limitation is in-

valid, then any such claims shall be voided unless such action, suit or proceeding be commenced within the shortest [fol. 6] limit of time permitted by the laws of such state to be fixed herein."

This defendant says that the plaintiff discovered the occurrences which gave rise to the claim during the months of December 1954 and January 1955 or prior thereto. That suit was not commenced until May 20, 1957, which is long after the 12-month limitation provided for in the policy sued upon.

This defendant further says that the policy sued upon was issued in the State of Illinois and is an Illinois contract and all questions of substantive law are to be governed in accordance with the statutes and common law of that state. That in accordance with the Laws of the State of Illinois, the said "Suit Clause" time limit is valid and enforceable.

8. The policy of insurance sued upon covers all risks of loss or damage to the property covered. This defendant says that the damage and loss complained of was not caused by a fortuitous or extraneous circumstances, but said damage and loss was caused by the deliberate act of Tyyne Delomn Clay, then wife of the insured John Clay, with the intent to destroy or dispose of said insured property. That the act of acts of Tyyne Delomn Clay and the subsequent loss or damage caused to the insured property is not covered under an all risk policy.

9. The defendant asserts its deductible provision of the policy sued upon in mitigation of the claimed damages and losses.

Wicker & Smith, 506 Ainsley Building, Miami, Flor-
[fol. 7] ida, by James A. Smith, Attorneys for Defendant.

Certificate of Service (omitted in printing).

[fol. 14] IN UNITED STATES DISTRICT COURT

VERDICT—June 4, 1958

West Palm Beach, Florida, June 4, 1958.

We, the Jury find in favor of the Plaintiff, John Clay, and assess Plaintiffs damages in the sum of $5,100.00, and assess his damages for attorney's fees reasonably incurred in the amount of $1,700.00.

So Say We All.

James M. Hawn, Foreman

IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT—June 4, 1958

Upon consideration of the Verdict of the Jury returned herein, it is thereupon,

Considered and Ordered that Final Judgment be and it is hereby entered in the said cause in favor of the Plaintiff, John Clay, and against the Defendant, Sun Insurance Office, Limited in the sum of Fifty-one Hundred Dollars ($5,100.00) together with attorney's fees reasonably incurred in the amount of Seventeen Hundred Dollars ($1,700.00) together with legal interest thereon from the date hereof, and may recover his costs in this case incurred, said costs to be taxed by the Clerk of this Court, and that the said Plaintiff have execution therefore, it is

[fol. 15] Done and Ordered at West Palm Beach, Florida, this 4th day of June A.D. 1958.

Julian A. Blake, Clerk, United States District Court, Southern District of Florida, By Joseph I. Bogart, Deputy Clerk (Seal)

IN THE UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO OR IN THE ALTERNATIVE FOR A NEW TRIAL—Filed June 12, 1958

Comes Now the defendant, Sun Insurance Office, Limited, and moves the Court to enter a judgment in its favor non obstante veredicto, pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure, or in the alternative to grant it a new trial, pursuant to Rule 59 of the Federal Rules of Civil Procedure, and would show unto this Honorable Court for its aforementioned motion that:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The Court erred in charging the jury as to larceny as same relates to the acts and conduct of the plaintiff's wife under the facts and circumstances and evidence of this case.

5. The Court erred in charging the jury as to larceny in its general application to the facts and circumstances [fol. 16] and evidence of this case.

6. That a verdict should be entered in favor of the defendant, Sun Insurance Office, Limited, on the basis that the insurance contract in this case does not cover losses by the willful, malicious and destructive acts of a member of the named insured's household and an additional insured under the said insurance contract, to wit, the plaintiff's wife, Tyyne Delomn Clay.

7. In construing the twelve-month suit clause contained in the said insurance contract involved in this case, the law to be applied in regard to this said clause is governed by the substantive law of the State of Illinois and not the law of the forum and, therefore, the suit having been brought after the twelve-month period as contained in the said insurance contract, said suit is barred from prosecution by the plaintiff.

Wherefore, the defendant moves this Honorable Court to enter a judgment non obstante veredicto or in the alternative to grant it a new trial.

Wicker & Smith, 506 Ainsley Building, Miami, Florida, by Joe C. Brannen, Attorneys for Defendant.

Certificate of Service (omitted in printing).

[fol. 17] In the United States District Court

Order Denying Post Trial Motions and Setting Supersedeas Amount—July 11, 1958

This cause coming on to be heard on defendant's Motion for Judgment Non Obstante Veredicto or in the Alternative for a New Trial, and after hearing argument of counsel and being fully advised in the premises, it is

Considered, Ordered and Adjudged that said motions be and the same are hereby denied.

Upon oral motion of the defendant for the setting of a supersedeas amount and the parties being in agreement thereto, it is further

Ordered and Adjudged that the supersedeas bond be and the same is hereby set in the amount of $7,500.00.

Done and Ordered this 11th day of July, 1958.

Emett C. Choate, United States District Judge.

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed August 8, 1958

Notice is hereby given that Sun Insurance Office, Limited, the above captioned defendant, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from the Final Judgment entered June 4, 1958.

[fol. 18] Joe C. Brannen, Wicker & Smith, 506 Ainsley Building, Miami, Florida, Attorneys for Appellant, Sun Insurance Office, Limited.

Certificate of Service (omitted in printing).

IN THE UNITED STATES DISTRICT COURT

Transcript of Trial Proceedings—June 4, 1958

West Palm Beach, Florida

The above entitled cause came on for hearing before the Hon. Emett C. Choate, United States District Judge, and a jury duly and regularly empannelled and sworn to try the same in open Court, at West Palm Beach, Florida, on June 4, 1958.

APPEARANCES:

Paschal C. Reese Esq., of the law firm of Gibson & Gibson, appearing on behalf of the Plaintiff.

Joe C. Brannen Esq., of the law firm of Wicker & Smith, appearing on behalf of the Defendant.

Thereupon: JOHN CLAY was called as a witness on his [fol. 19] own behalf, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Reese:

Q. Please state your name.
A. John Clay.

Q. Mr. Clay, are you the plaintiff in this suit?
A. I am.
Q. Where do you live at this time?
A. Fort Lauderdale.
Q. Where did you live in the latter part of 1954 and early in 1955?
A. On my ranch at Lake Harbor, Florida.
Q. What is the name of that ranch?
A. The J. C. Ranch.
Q. Is that in Palm Beach County?
A. Yes.
Q. Did you have certain personal effects in the dwelling house at the Lake Harbor address during the latter part of 1954 and the early part of 1955?
A. Yes, I did.
Q. I hand you an insurance policy and ask you if you recognize that policy?
A. Yes, I do. That is a policy that I insured under.
Q. Did this policy issued by the Sun Insurance office insure the property located in your dwelling?
A. Yes, sir, it does.

[fol. 20] OFFER IN EVIDENCE

Mr. Reese: At this time, your Honor, I would like to offer this in evidence.

The Court: It will be admitted, having been stipulated to at pretrial.

(Thereupon the instrument was marked in evidence as Plaintiff's Exhibit 1.)

The Court: This is the policy stipulated to be the policy sued upon and which was in effect at the time of the alleged loss.

Mr. Reese: That's right.

By Mr. Reese:

Q. Now, Mr. Clay, did any of the personal property covered by that policy in your dwelling house disappear?
A. Yes it did, sir.

. . . . . .

[fol. 34] Q. And all these were taken from your residence?

A. That is correct.

Q. When did these things actually disappear?

A. In December and January of 1954 and 1955.

Q. Mr. Clay, when did you move to the State of Florida?

A. 1952.

Q. Did you buy property in the state?

A. Yes. I bought a ranch at that time.

Q. Is that the ranch where you were living?

A. Yes.

Q. Have you been a resident and citizen of Florida since 1952?

A. I have.

Q. Continuously?

A. Yes, continuously.

* * * * * * *

[fol. 35] Cross examination.

By Mr. Brannen:

Q. Mr. Clay, referring to Plaintiff's Exhibit 1 which is the insurance policy in this case, when was this policy taken out? Is it April 22, 1952?

A. Yes.

Q. And at that time were you a resident of the State of Illinois?

A. I believe so, yes.

Q. What was your address that you gave on the policy as being your residence?

A. 1250 Lake Shore Drive.

Q. And that is in Chicago, Illinois, is it not?

A. Yes.

* * * * * * * *

[fol. 36] Q. Now, you say that you moved down to the State of Florida. That was in 1952; is that correct?

A. That's right.

Q. Do you know approximately what month it was?

A. Around July or August, I believe.

Q. July or August of 1952. Where did you come to in Florida?

A. Palm Beach.

Q. Where did you live, what residence?

A. I was living here. No, I was living on a boat that I had.

Q. You came down in a boat and you lived on the boat; is that right?

A. Yes, we were here in Miami and Fort Lauderdale, just around different places.

Q. In other words, you stayed on your boat and you went from one place to another; is that right?

[fol. 37] A. Yes.

Q. Where was your next residence?

A. At Clewiston.

Q. Where did you live in Clewiston?

A. At the Clewiston Inn.

Q. And after Clewiston where did you go?

A. Out to the ranch.

Q. Was that the J. C. Ranch?

A. Yes.

Q. And all during this time you were living with your wife, Mrs. Clay, is that right?

A. That's right, yes.

Q. Do you know approximately when you moved out to the J. C. Ranch? Let me ask you this first of all. What was the date that you moved out to the ranch?

A. I believe that was about June, somewhere around there of 1954.

Q. 1954?

A. Somewhere around there, yes.

Q. Now, you came down to Florida in 1952. You lived on the boat for awhile, and you lived in Clewiston for awhile, and in June, 1954 you moved out to the ranch. Is that correct?

A. Yes.

Q. And that was the first time you had purchased a residence for yourself in Florida?

[fol. 38] A. That's right.

Q. You hadn't owned a home prior to that time, had you?

A. No.

* * * * * * *

[fol. 39] Q. You have testified on direct examination concerning these losses, and if I understand you correctly, it is your testimony that these losses occurred in November, December and January of 1954. Is that correct?

A. That's right.

Q. That would be November and December of 1954 and January of 1955.

A. Yes.

Q. Now, these particular items, did you miss them all at one time, or did you discover them over that three months period?

A. The tea set and the silver plates disappeared in November. All the rest of the stuff was in December.

Q. All the rest of these items you have listed here were in December, 1954?

A. Except the family pictures was destroyed in—I be-
[fol. 40] lieve that was in December.

Q. In other words, everything but the tea set and the twelve silver plates was either lost or destroyed in December 1954, is that right?

A. That's right.

* * * * * * *

[fol. 43] Q. I am a little bit confused here. If I understand your testimony before, you said that all of these other losses occurred in December, 1954.

A. I am wrong about that.

Q. Now you say that they disappeared in January of 1955. Is it your testimony that all of these other articles, aside from the tea set and twelve service plates, disappeared in January, 1955?

A. Yes, and the family picture. That's right. December was too early because I left the ranch in January.

Q. Now, was the picture cut in December or January?

A. The picture was cut in the last part of December.

* * * * * * *

[fol. 44] Q. Now, when you left to go on this business trip did you have any idea of what was transpiring in your wife's mind?

[fol 45] A. No, I didn't.

Q. She had previously cut the picture, had she not?

A. Yes, but I removed that from the house.

Q. That indicated something to you when she cut the picture, didn't it?

A. Naturally.

Q. Did you start any divorce proceedings at that time?

A. No.

• • • • • • •

[fol. 51] Q. Now, you subsequently went through divorce proceedings with your wife wherein you secured a divorce; is that right?

A. That's right.

• • • • • • •

[fol. 52] By Mr. Brannen:

Q. During the divorce proceedings, did you seek to have the Court require Mrs. Clay to give you back any of these articles listed on the board?

[fol. 53] A. I asked my attorney to try to get—what the Court did about it, I don't know.

Q. You requested your attorney to get the Court to require her to give these articles back?

A. Whether that was allowed or not, I don't know. The record will show it.

Q. Did you, in fact, ever get them back?

A. No, of course not.

• • • • • • •

By Mr. Brannen:

Q. Was there actually any property settlement whereby you were to get certain property and she was to get certain property?

A. Yes.

Q. Do you know of your own knowledge whether or not in that property settlement you requested through the Court Mrs. Clay to return any of these articles to you?

A. I don't know what the attorneys did on the Court [fol. 54] proceedings. I would have to go back to the Court record to find out what was done about that. I can-

not remember just exactly what was done about that, but I know we didn't get the tea set back.

Q. Mr. Clay, do you know the date that you first notified the insurance company of these items that you are claiming?

A. I think that is in the record here. I haven't got the date in my head.

Mr. Brannen: Can we stipulate to that?

Mr. Reese: February 1, 1955.

The Witness: I think that is approximately right. Right after it was done. After we missed the stuff.

[fol. 55] Mr. Brannen: I think, Mr. Reese, you have agreed with me to stipulate that the insurance company investigated this under reservation rights.

Mr. Reese: That's right.

By Mr. Brannen:

Q. Was there anyone living in the house with you and your wife out at the JC ranch?

A. In the house, no.

Q. Was there any out-buildings?

A. Yes.

Q. Were they in the immediate vicinity of the house?

A. Yes.

Q. Who lived in those?

A. The manager and his wife.

Q. Is that your ranch foreman?

A. Ranch foreman.

Q. Are they being called to testify today?

A. Yes.

Mr. Brannen: Mr. Reese, can we stipulate that the company denied liability on April 6, 1955?

Mr. Reese: Yes, I believe that is the date that was set up at the pretrial.

[fol. 56] The Court: That was on the basis that this policy didn't cover this particular claim?

Mr. Brannen: I think that's all I have at the present time, your Honor.

Redirect examination.

By Mr. Reese:

Q. Mr. Clay, when did you actually buy the JC Ranch?
A. 1952.
Q. And you owned the JC Ranch while you were living at the Clewiston Inn?
A. Yes.
Q. And you operated the ranch from the Clowiston Inn?
A. Yes, certainly.
Q. Do you remember the property settlement that was in the final decree of your divorce?
A. Yes, I remember it very well.
Q. Would it have any reference at all to this property here?
A. No.
Q. It referred to property outside of the State of Florida, didn't it?
A. That's true.

[fol. 57] Mr. Brannen: He is slightly leading.
The Court: Yes.
Mr. Reese: Your Honor, I agree it is, but he had implied—
The Court: Go ahead, don't lead him.
Mr. Reese: I don't have any further questions, your Honor.
Mr. Brannen: No further questions.
The Court: Do you know the firm of Bartholomay & Clarkson Insurance Agents?
The Witness: They were the agents that I took my insurance out through.
The Court: Did you have any other insurance with them?
The Witness: I have had, yes. For a number of years I have dealt with them entirely.
The Court: Did you communicate with them after you came to Florida?
[fol. 58] The Witness: Yes.
The Court: 1250 Lake Shore Drive, Chicago, Illinois, what is that?
The Witness: That was my wife's house which was sold when we came down to Florida.

The Court: Sold in 1952?
The Witness: Yes.
Mr. Reese: You may come down.
Mr. Brannen: Just one more question, if I may.
The Court: Yes.

Recross examination.

* * * * * * *

[fol. 59] By Mr. Brannen:

Q. Mr. Clay do you remember having your deposition taken down in Miami?
A. Yes.
Q. And do you remember raising your right hand?
A. That's right.
Q. And being sworn in?
A. That's right.
Q. Let me ask you whether or not you remember being asked these questions and giving these answers—on page 3-A of the Plaintiff's deposition:

[fol. 60] "Q. You live in and considered Illinois as your home at that time?"

And your answer was:

"Yes." The next question is:

"Q. I notice you paid a premium here of $900 and some dollars. Did you pay that in cash to Bartholomey when you got the policy?"

And you answered:

"No, by check."

The next question is:

"I mean you did not make continuous payments on it. You just paid in one lump sum when you got the policy?"

And your answer:

"I presume that I did."

The next questions:

"And the policy was delivered to you there in Chicago by Bartholomay?"

And you answered:

"Yes."

The Witness: I believe that was true, yes.

• • • • • • •

[fol. 106]

IN THE UNITED STATES DISTRICT COURT

STATEMENT OF THE POINTS ON WHICH THE APPELLANT INTENDS TO RELY ON APPEAL—Filed October 31, 1958

Comes Now the appellant, Stu Insurance Office, Limited, a corporation organized under the laws of Great Britain, authorized to transact business in Florida, and states the points on which the appellant intends to rely on appeal:

1. The verdict is contrary to law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The Court erred when it failed to direct a verdict for the defendant-appellant at the close of the plaintiff's case.

[fol. 107] 5. The Court erred when it failed to direct a verdict for the defendant-appellant as a matter of law at the close of the plaintiff's case pursuant to defendant-appellant's motion based upon its defense as contained in paragraph number seven in its answer.

6. The Court erred when it failed to direct a verdict for the defendant-appellant as a matter of law at the close of the plaintiff's case pursuant to defendant-appellant's motion based upon its defense as contained in paragraph number eight in its answer.

7. The Court erred by failing to grant defendant-appellant's motion for judgment non obstante veredicto or in the alternative for a new trial.

Wicker & Smith, 506 Amsley Building, Miami, Florida, By Joe C. Brannen, Attorneys for Appellant.

IN THE UNITED STATES DISTRICT COURT

APPELLANT'S DESIGNATION OF RECORD ON APPEAL—
Filed October 31, 1958

To the Clerk of the United States District Court for the Southern District of Florida, West Palm Beach Division:

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the appellant designates the following portions of the record to be contained in the record on appeal in [fol. 108] the above entitled cause to the United States Circuit Court of Appeals for the Fifth Circuit:

1. The complaint and the exhibit attached thereto—Exhibit A.

2. Answer of the defendant.

3. The entire transcript, stenographically reported, of the trial of the captioned matter.

4. Verdict.

5. Final Judgment.

6. Defendant's motion for judgment non obstante veredicto or in the alternative for a new trial.

7. Order denying post trial motions and setting supersedeas amount.

8. Notice of appeal, with date of filing.

9. Motion for extension of time to file transcript of record.

10. Order on motion to extend time to file transcript.

11. This designation.

12. Plaintiff's Exhibit Number One.

13. A concise statement of the points on which the appellant intends to rely on appeal is appended to this designation.

14. Appellant further reserves the right to designate further other portions of the record, proceedings, and evidence to be contained in the record on appeal, if such procedure is deemed necessary by reason of the filing by [fol. 109] appellee of any counter-designation or any objection to this designation.

Dated this 31st day of October, 1958.

Wicker & Smith, 506 Ainsley Building, Miami, Florida, Attorneys for Appellant, By Joe C. Brannen.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 111]

CLERK'S CERTIFICATE (omitted in printing).

[fol. 112]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—March 11, 1959 (omitted in printing).

[fol. 113]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17525

SUN INSURANCE OFFICE LIMITED, Appellant,

versus

JOHN CLAY, Appellee.

Appeal from the United States District Court for the Southern District of Florida.

OPINION—April 8, 1959

Before Rives and Tuttle, Circuit Judges, and Simpson, District Judge.

TUTTLE, Circuit Judge: This is a suit on a personal property floater policy. It was instituted in the United States District Court for the Southern District of Florida by the insured, John Clay. A jury awarded recovery in the total amount of $6,800.00 and judgment was entered accordingly. The insurer appeals, contending the district court erred [fol. 114] in holding that the stipulation in the policy which forbade suit unless it was instituted within twelve months next after discovery of the loss[1] was rendered void and unenforceable by Florida Revised Statute 95.03 (1957), which reads as follows:

"Stipulations in contract shortening period of limitation illegal.—All provisions and stipulations con-

[1] "Suit Clause:—No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the state within which this Policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein."

> tained in any contract whatever entered into after May 26, 1913 fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

We agree with appellant's contention as to this defense, and therefore we do not reach its other contentions.

The policy was issued and delivered to appellee on April 22, 1952, in Chicago, Illinois. At that time appellee was a citizen of and resided in the state of Illinois. He paid the premium in a lump sum in Chicago when he received the policy. Subsequently, in July, 1952, appellee moved to [fol. 115] Florida. He purchased a ranch near Lake Harbor, Florida, in July or August of 1952 and became a resident of Florida from that time on. In December, 1954 and January, 1955, while he was living at the ranch near Lake Harbor, certain of his insured personal property was destroyed by vandalism and other insured property was stolen. Appellee notified appellant of his losses on February 1, 1955. After investigating the claim, appellant denied liability on April 6, 1955. Suit was not instituted until May 20, 1957.

Under the terms of the "Suit Clause" this suit was barred because of appellee's failure to institute it within twelve months next after he had discovered the losses. According to the law of Illinois, such a contractual provision was and is valid and enforceable.[2]

This insurance policy was issued and delivered in Illinois to a citizen of that state; and it was paid for by him while he was present and residing in that state. It insured the appellee's personal property which was at that time pre-

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[2] Trichelle v. Sherman & Ellis, Inc., 259 Ill. App. 346; Hartzell v. Maryland Cas. Co., 163 Ill. App. 221; see also Smith-Hurd Ann. St. Ch. 73, §969a(1)(k) (1958); cf. Smith-Hurd Ann. St. Ch. 73 §§837(1)(a), 903(1)(a) (1958).

sumably in the same state. According to the law of Florida, it was therefore an Illinois contract, the validity and interpretation of which would ordinarily be determined by the law of Illinois. *Connor* v. *Elliott*, 79 Fla. 513, 85 So. 164, cert. dismissed, 254 U.S. 665. Since the law of Illinois validates clauses limiting the time within which suit may be brought, this clause presents a good defense to appellee's [fol. 116] suit unless the Florida statute renders it unenforceable in any Florida court.

This presents a question which substantially affects the outcome of this suit, and since federal jurisdiction in this case is based on diversity of citizenship, we must apply the law which the state courts of the forum would apply (*Guaranty Trust Co.* v. *York*, 326 U.S. 99; *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487), insofar as the state law does not violate the constitution of the United States. See *Sampson* v. *Channell*, 1 Cir., 110 F. 2d 754, cert. denied, 310 U.S. 650.

The wording of the Florida statute is quite general and broad, and it appears to apply to all contracts, wherever made or performed, which happen to be sued upon in the courts of Florida. However, there are no reported instances where this statute has been applied under circumstances similar to those presented here; and the jurisprudence of Florida gives us reason to believe that the Florida state courts would construe it as being inapplicable under these circumstances.

The following representative decisions demonstrate the Florida courts' tendency, based on their interpretation of the requirements of due process and their recognition of the general common law rules of comity, to refrain from attempting to apply Florida statutes or their own notions of public policy to foreign contracts which are valid where entered into: *Connor* v. *Elliott, supra; Sovereign Camp, Woodmen of the World* v. *Mixon*, 79 Fla. 420, 84 So. 171; *Equitable Life Assur. Soc. of U.S.A.* v. *McRee*, 75 Fla. 257, [fol. 117] 78 So. 22; *American Fire Ins. Co.* v. *King Lumber & Mfg. Co.*, 74 Fla. 130, 77 So. 168, aff'd, 250 U.S. 2.

It is thus quite possible that the Florida state courts would reach the same conclusion that the Kentucky court reached in *Union Cent. Life Ins. Co.* v. *Barnes*, 175 Ky.

364, 194 S.W. 339[3]—that the validity of a contractual provision limiting the time within which suit can be brought is to be determined by the lex locus contractu rather than the lex fori. This result could be expected if the court did not fall into the Alabama Supreme Court's error[4] of assuming that the issue presented concerned the choice of the applicable statute of limitations rather than the choice of the substantive law governing the validity of the contract itself.[5]

We are not obliged, however, to make the difficult guess as to what the Florida state courts might decide if they were presented with this issue, for we conclude that there is only one possible decision which would be consonant with due process of law:[6] to deny application of the Florida statute to this contract.

Examining the decisions of the Supreme Court of the United States on this subject, we find none which involves [fol. 118] the identical circumstances presented here, but we find several which present very similar facts and which, we feel, clearly and unmistakably point out the result which must be reached in this case.

The case of *Home Insurance Co.* v. *Dick, supra*, involved a contract of marine insurance issued and paid for in Mexico and insuring a vessel which was never inside the state of Texas, the state in which suit on the policy was brought. The original insurance was payable in Mexico. After this insurance was issued, the risk was reinsured (outside of Texas) by a New York insurer which was qualified to do business in Texas. The original assured assigned the policy to a citizen of Texas who was then in Mexico and remained there until after the occurrence of the loss; after which he

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[3] See also Brooks v. Travelers' Protective Ass'n of America, E.D. N.Y., 47 F. 2d 618.

[4] Galliher v. State Mutual Life Ins. Co., 150 Ala. 543, 43 So. 833.

[5] See Union Central Life Ins. Co. v. Barnes, 175 Ky. 364, 194 S.W. 339, 340; Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 149; cf. Home Insurance Co. v. Dick, 281 U.S. 397, 406, 409, 410.

[6] Cf. Sampson v. Channell, 1 Cir., 110 F. 2d 754, cert. denied, 310 U.S. 650.

returned to Texas and brought an *in rem* action in Texas by garnishment proceedings directed against the domestic insurance agents. The defendants pleaded a stipulation in the policy forbidding suit except within one year next following the loss. The Texas courts denied the defendants the benefit of this stipulation. They held it was invalidated by a Texas statute outlawing such agreements. The Supreme Court of the United States reversed the Texas courts by a unanimous vote. In an opinion written by Mr. Justice Brandeis, the Court stated that the statute as construed by the Texas courts deprived the defendants of property without due process of law. This statute, the Court held, increased their obligation and imposed burdens they had not contracted for; and this, the Court held, could not be done even in the name of the public policy of Texas.

[fol. 119] This holding was followed by Judge Strum, of the District Court for the Southern District of Florida, later a member of this Court, in the case of *Holderness* v. *Hamilton Fire Ins. Co. of New York*, S.D.Fla., 54 F. Supp. 145, which involved the Florida statute we are here considering. But, appellee argues, in the Holderness case the plaintiff was a resident of the state of North Carolina, the policy was issued in North Carolina, and the building which was insured was located in North Carolina ("Holderness was nothing more than a sojourner in the State of Florida."). Thus, he contends, the Holderness decision, like the Dick decision, was dictated by a situation which is not duplicated in this case: the forum's lack of sufficient connection with the disputed contracts to warrant the invocation of the public policy of the forum.

Assuming that a state might, if its connections with a foreign contract are sufficiently great, be permitted to effectuate its own public policy by striking down an agreement which was valid where made, the question remains: are the contacts which Florida has with this contract great enough to permit this to be done in this case? These contacts consist of nothing more than the presence of the insured property and the beneficiary in the state of Florida beginning subsequent to the formation of the contract and continuing up to the time of the suit. Nothing was to be done in Florida pursuant to the insurance contract except the purely min-

isterial act of payment by the insurer, and that was so only because of the fortuitous circumstance of the assured's removal from Illinois to Florida. Under strikingly similar circumstances, the Supreme Court has held that the forum [fol. 120] state did not have the right to deprive a defendant of a contractual provision limiting the time within which suit could be brought. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, reh. den., 292 U.S. 607.

In the Delta & Pine Land case, the contract concerned a fidelity bond by which the defendant, a Connecticut corporation, qualified to do business in Mississippi and Tennessee, had insured the plaintiff, a Mississippi corporation with its principal office in Tennessee, against loss resulting from dishonesty of its employees "in any position anywhere." The policy listed twenty-one employees who were then working in Mississippi.[7] The contract, however, was negotiated and executed in Tennessee. It contained a condition that any claim under the contract had to be made within fifteen months from the termination of the suretyship agreement. One of the employees whose acts were insured against committed defalcations in Mississippi and the insured sued the indemnitor in that state. A Mississippi statute stated that all contracts of insurance on property, lives or interests in Mississippi were deemed made in that state; another stated that the Mississippi statutory periods of limitations of actions could not be altered by private agreements. The Mississippi court, applying these statutes, struck down the aforementioned contractual condition and allowed recovery on the contract despite the plaintiff's failure to make claim within the fifteen-month period. The Supreme Court reversed in a unanimous decision.

[fol. 121] The following language from the Supreme Court's opinion sets forth precisely the principles we must follow and the decision we must make in the present case:

> "It is urged, however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's

[7] Watson v. Employers Liability Co., 348 U.S. 66, 77.

duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond, to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events,—loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (Home Insurance Co. v. Dick, supra, p. 408), it may not on grounds of policy ignore a right which has lawfully vested elsewhere if, as here, the interest of the forum has but slight connection with the substance of the con-
[fol. 122] tract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment. Aetna Life Ins. Co. v. Dunken, supra; Home Insurance Co. v. Dick, supra. Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in

a different manner. Compare Bond v. Hume, 243 U.S. 15, 22. But clearly this is not such a case." 292 U.S. at 149, 150.

In accordance with the foregoing, we hold that the provision in the subject insurance policy which limits the time in which suit can be brought is a substantial property right which is protected by the Fourteenth Amendment to the Constitution, and under the circumstances of this case a violation of due process would result from the application of Florida Statute 95.03 to this provision.

As the Supreme Court observed in the Delta & Pine Land case, our conclusion that it would violate due process renders unnecessary a consideration of whether it would violate the full faith and credit or the contract clauses of the [fol. 123] federal constitution. Extensive research, however, among the decisions of the Supreme Court and the lower federal and state courts relating to control of interstate relations by the due process and full faith and credit clauses discloses that the Dick and Delta & Pine Land decisions have been cited many times and have never been called into question or limited by later decisions of the Supreme Court. See, e.g., *Watson* v. *Employers Liability Corp.*, 348 U.S. 66, 71, 76-78; *Lauritzen* v. *Larsen*, 345 U.S. 571, 590, 591; *Order of Travelers* v. *Wolfe*, 331 U.S. 549, 608, 628; *Pink* v. *A.A.A. Highway Express*, 314 U.S. 201, 211; cf. *Hanson* v. *Deckla*, 357 U.S. 235, 254; *Hoopeston Co.* v. *Cullen*, 318 U.S. 313.

The cited cases form part of a larger body of law which has as a basic premise the principle that only where a state has significant interests involved may it impair property rights created in other states. See, e.g., *Pink* v. *A.A.A. Highway Express*, 314 U.S. 201, 209-11. A secondary principle which is also of significance here is that even though the affected interests of the state may be substantial enough to justify its refusal to give affirmative help in enforcing a foreign contract which it finds obnoxious, these interests may, on the other hand, be insufficient to justify the state's rewriting of the contract, enlarging the obligation of the makers and enforcing it in a manner contrary to their undertaking. *Watson* v. *Employers Liability Corp.*,

348 U.S. 66, 76 (concurring opinion); *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 149, 150; *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 408-10; [fol. 124] see also *Holderness* v. *Hamilton Fire Ins. Co. of New York*, S.D.Fla., 54 F. Supp. 145.

Following the principles set out above, we hold that the district court erred in failing to sustain the appellant's defense to this suit.

The judgment of the district court is Reversed and the case is Remanded for entry of judgment in favor of the appellant.

RIVES, Circuit Judge, Dissenting:

The Legislature of the State of Florida has enacted that, "All provisions and stipulations contained in any contract whatever . . . fixing the period of time in which suits may be instituted under any such contract . . . , at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section." Florida Statutes Annotated, §95.03. The language of that statute seems to me to leave no room for construction; it applies to "any contract whatever."

No one has attacked the validity of that statute as applied to contracts made in Florida, or can reasonably do so. Stipulations shortening the period of limitation result in the same evils and abuses whether entered into in the State of Florida or outside that State. I cannot agree that the [fol. 125] Florida Legislature, or the courts of that State, must accord to such a stipulation contained in an ambulatory contract of insurance held by a Florida resident, but entered into in Illinois, any greater sanctity than they would accord to such a stipulation made in Florida. I think that the Florida Legislature can protect residents of that State against the application in Florida courts of stipulations shortening the period of limitation in contracts performed in Florida regardless of the place where the contracts are executed. I therefore respectfully dissent.

[fol. 126]

IN THE UNITED STATES COURT OF APPEALS

No. 17,525

SUN INSURANCE OFFICE LIMITED

versus

JOHN CLAY

JUDGMENT—April 8, 1959

This cause came on to be heard on the transcript of the Record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for entry of judgment in favor of the appellant;

It is further ordered and adjudged that the appellee, John Clay, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, dissenting."

[fol. 131]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION OF JOHN CLAY FOR REHEARING —Filed May 12, 1959

To the Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

John Clay, plaintiff-appellee, above named, presents this, his petition for a rehearing in the above entitled cause and in support thereof respectfully shows:

1. The Court in its opinion of reversal herein has clearly failed to recognize that Florida Revised Statute 95.03 (1957) emphatically declares that any attempt to govern the Florida Statute of Limitations by contract is contrary to the public policy of the State and is illegal and void.

[fol. 132] 2. The Court in its opinion of reversal herein assumes that the Supreme Court of Florida would reach the same conclusion that the Kentucky Court reached in *Union Central Life Insurance Company* v. *Barnes,* 175 Ky. 364, 194 S.W. 339, although the State of Kentucky does not have a statute similar to or in any wise resembling Florida Revised Statute 95.03 (1957) and the Court completely disregards the ruling of the Alabama Supreme Court in the case of *Galliher* v. *State Mutual Life Insurance Company,* 150 Ala. 543, 43 So. 833, which said case is a ruling on a statute similar to and having the same effect as Florida Revised Statute 95.03 (1957).

3. The Court in its opinion of reversal herein has abrogated the validity of a statute of the State of Florida although the validity of said statute was not attacked by the appellant.

4. The case of *Hartford Accident and Indemnity Company* v. *Delta and Pine Land Company,* 292 U.S. 143, reh. den. 292 U.S. 607, which the Court regards as a conclusive

ruling of its opinion of reversal herein is clearly distinguishable from the case at bar in that the Delta and Pine Land case dealt with a fidelity bond, covering employees located in various States of the Union, while the case at bar deals with a personal property floater policy (world wide), covering property owned by a citizen of the State of Florida and located within the State of Florida.

5. The Court in its opinion has failed to recognize that the complaint alleges that the appellant-defendant is a corporation authorized to do business in Florida and that [fol. 133] this allegation is admitted by the answer of the appellant defendant; that therefore the appellant was subject to the laws of Florida and the effect that this situation has on due process.

Wherefore, upon the foregoing grounds it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be upon further consideration, affirmed.

Paschal C. Reese, 209 South Olive Avenue, West Palm Beach, Florida, Attorney for Appellee.

Certificate of Counsel (omitted in printing).

[fol. 134]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION OF STATE OF FLORIDA FOR REHEARING —Filed May 12, 1959

To the Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

The State of Florida, by its Attorney General, Richard W. Ervin, joins the appellee, John Clay, in petitioning for a rehearing in the above-entitled cause and in support thereof respectfully shows:

(1) The Court in its opinion of April 8, 1959, assumed that the Supreme Court of Florida would reach the same conclusion that the Court of Appeals of Kentucky reached in *Union Central Life Insurance Company* v. *Barnes*, 175 [fol. 135] Ky. 364, 194 S.W. 339. The clear and unambiguous language of Section 95.03, Florida Statutes, would permit no such conclusion. Said section prohibits the courts of Florida from giving *any* effect to stipulations contained in any contract fixing the period of time in which suits may be instituted under such contract.

(2) The Court in its opinion of April 8, 1959, overlooked: (a) the fact that the State of Florida is not only the location of the forum but is also the state in which the cause of action arose; and (b) the fact that not only is the appellee a resident of the State of Florida but the appellant is admitted to do business in Florida and has thereby subjected itself to regulation of its insurance business by the State of Florida. These facts in addition to those enumerated on page 7 of the Court's opinion justify the imposition of Section 95.03, Florida Statutes, upon the contract in question.

(3) The Court in its opinion of April 8, 1959, overlooked: (a) the fact that a contract of insurance is not an ordinary bilateral contract but is a "form" type contract [cf. *The Kensington*, 183 U.S. 263]; and (b) the fact that the "agreement" to fix a period of limitations in the contract in question, since it relates to the administration of justice, is not entitled to the same protection accorded to ordinary contract provisions [cf. *Carbon Black Export* v. *SS Monrosa*, (5th Cir.) 254 F.2d 297, cert. dismissed ..... U.S. ....., 3 L. Ed. 2d 723].

(4) The case of *Hartford Accident and Indemnity Company* v. *Delta and Pine Land Company*, 292 U.S. 143, which the Court in its opinion of April 8, 1959, relied most heavily [fol. 136] upon, is clearly distinguishable from the case at bar in that the stipulation in question in said case was as follows:

> "Any claim hereunder must be duly made upon the surety within fifteen (15) months after the termina-

> tion of the suretyship for the defaulting employee, and no suit, action, or proceeding shall be brought hereunder by the employer against the surety after the expiration of twelve (12) months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing construction hereof then within the shortest period of limitation permitted by such law." 150 So. 206.

The stipulation requiring presentation of a claim within fifteen months, *not* the stipulation requiring the institution of a suit within twelve months, was at issue in the *Delta and Pine Land Case.*

Wherefore, upon the foregoing grounds it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, affirmed.

Richard W. Ervin, Attorney General; Allan F. Milledge, Assistant Attorney General, Capitol Building, Tallahassee, Florida, *Amicus Curiae.*

[fol. 137] Certificate of Counsel (omitted in printing).

[fol. 149]

IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

MINUTE ENTRY OF ORDER DENYING PETITIONS FOR REHEARING—May 28, 1959

It is ordered by the Court that the petitions for rehearing filed in the above styled numbered cause be, and the same are hereby Denied.

"Rives, Circuit Judge, dissenting."

[fol. 150] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 151]

IN SUPREME COURT OF THE UNITED STATES

No. 349, October Term, 1959

JOHN CLAY, Petitioner,

vs.

SUN INSURANCE OFFICE LIMITED

ORDER ALLOWING CERTIORARI—October 26, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 152]

SUPREME COURT OF THE UNITED STATES

No. 349, October Term, 1959

JOHN CLAY, Petitioner,

vs.

SUN INSURANCE OFFICE LIMITED

JUDGMENT—June 13, 1960

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

This Cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Fifth Circuit, and was argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause, be, and the same is hereby,

vacated with costs; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Fifth Circuit for proceedings in conformity with the opinion of this Court.

It is further ordered that the said petitioner, John Clay, recover from Sun Insurance Office Limited Four Hundred Twenty Six Dollars and Four Cents ($426.04) for his costs herein expended and have execution therefor.

Per Mr. Justice Frankfurter

Clerk's costs	$ 194.52
Printing record	231.52
Total	$ 426.04

Dissenting opinion by Mr. Justice Black with whom Mr. Chief Justice Warren and Mr. Justice Douglas join.

Dissenting opinion by Mr. Justice Douglas.

[fol. 153] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17,525

SUN INSURANCE OFFICE LIMITED, Appellant,

v.

JOHN CLAY, Appellee.

Appeal from the United States District Court for the Southern District of Florida.

CERTIFICATE AS TO QUESTIONS CERTIFIED BY THIS COURT TO THE SUPREME COURT OF THE STATE OF FLORIDA—
Filed August 12, 1960.

Pursuant to the opinion and mandate of the Supreme Court of the United States in the above entitled cause, the

following questions are certified by this Court to the Supreme Court of the State of Florida

(1) Are the provisions of Section 95.03 and 95.11(3) Florida Statutes, making void any provisions of an insurance contract requiring suit on the contract to be filed in a period shorter than five years applicable to a personal property, world-wide, all-risks, floater insurance policy under the following circumstances: the policy was applied for in Illinois from a British company, qualified to do business in Illinois and in Florida and nine other states, by the assured, who was then a resident of Illinois; the premium was paid in Illinois and the policy was issued there in 1952; subsequently, the assured moved his legal residence to Florida and the losses occurred there in 1954-55; suit was filed in Florida more than twelve months after discovery of the loss; the policy provided that any suit under the contract must be filed within twelve months from the discovery of the loss; the twelve-month limitation clause of the contract is valid and enforceable in the State of Illinois?

[fol. 254] (2) Does an all-risks policy of insurance containing the following provision,

"The Company will also pay the actual loss of or damage (except by fire) to property of the Assured not specifically excluded by this Policy caused by theft or attempt thereat; or by vandalism or malicious mischief to the interior of the residences of the Assured,"

and containing numerous limitations, exceptions and exclusions but none touching on acts of a spouse of an assured, cover losses resulting from acts of vandalism and from theft committed by the wife of the assured, hostile to him and without his consent, when the property damaged and taken was in the common residence of the assured and his wife?

It is hereby certified that the disposition of this case in this Court may be controlled by the answers given to these questions by the Supreme Court of the State of Florida.

By direction of the Court, the following documents from the files of the entitled cause are submitted to the Supreme Court of Florida for its convenience in determining the questions certified:

1. Transcript of Record
2. Brief of Appellant
3. Brief of Appellee
4. Opinion of Court of Appeals, Fifth Circuit, with dissent of Judge Rives
5. Petition for Rehearing (Appellee)
6. Petition for Rehearing of the State of Florida as Amicus Curiae
7. Brief of the State of Florida, Amicus Curiae (supporting petition for rehearing)
8. Denial of Rehearing, without opinion
9. Opinion of Supreme Court of the United States in #349, October Term 1959, John Clay, Petitioner, v. Sun Insurance Office, Limited, decided June 13, 1960.

[fol. 155]

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1961

Case No. 31,079

SUN INSURANCE OFFICE, LIMITED, Appellant,

vs.

JOHN CLAY, Appellee.

Opinion filed October 18, 1961

Certified Questions from the United States Court of Appeals, Fifth Circuit

Keen, O'Kelley & Spitz, J. Velma Keen, Charles H. Spitz and Rein, Mound & Cotton (New York, New York), for Appellant

Paschal C. Reese and Gibson, Gibson & Reese, for Appellee

Richard W. Ervin, Attorney General, Robert J. Kelly and James Mahorner, Assistant Attorneys General, as Amicus Curiae

Fred M. Burns as Amicus Curiae

OPINION

Roberts, C.J.

We here consider two questions of state law certified by the United States Court of Appeals for the Fifth Circuit to this court for decision as authorized by §25.031, Fla. Stat., and Florida Appellate Rule 4.61. The Court of Appeals acted in response to the opinion and mandate of the United States Supreme Court in Clay v. Sun Insurance Office, Limited, #349, October Term 1959, opinion filed June 13, 1960, 363 U. S. 207, 80 Sup. Ct. 1222, 4 L. Ed. (2d) 1170, which vacated the judgment of the Court of Appeals in the cause, Sun Insurance Office Limited v. John Clay, C. A. 5, 265 F. 2d 522, and remanded the cause to such court.

Original Filed—November 9, 1961

[fol. 156] The facts and circumstances culminating in the instant litigation, and its history, are stated in detail in the opinions of the federal appellate courts referred to above. The salient facts necessary to our determination of the legal questions presented to this court for decision are, however, stated in the questions as certified to this court by the Court of Appeals. The first question certified reads as follows:

> "(1) Are the provisions of Section 95.03 and 95.11 (3) Florida Statutes, making void any provisions of an insurance contract requiring suit on the contract to be filed in a period shorter than five years applicable to a personal property, world-wide, all-risks, floater insurance policy under the following circumstances: the policy was applied for in Illinois from a British company, qualified to do business in Illinois and in Florida and nine other states, by the assured, who was then a resident of Illinois; the premium was paid in Illinois and the policy was issued there in 1952; subsequently, the assured moved his legal residence to Florida and the losses occurred there in 1954-55; suit was filed in Florida more than twelve months after discovery of the loss; the policy provided that any suit under the contract must be filed within twelve months from the discovery of the loss; the twelve-month limitation clause of the contract is valid and enforceable in the State of Illinois?"

Section 95.03, supra, was enacted in 1913 as §§1 and 2 of Ch. 6465, Acts of 1913, and provides as follows:

> "All provisions and stipulations contained in any contract whatever . . . fixing the period of time in which suits may be instituted under any such contract . . . at a period of time less than that provided by the statute of limitations of this state are hereby declared . . . to be illegal and void. *No court of this state shall give* [fol. 157] *effect to any provision or stipulation of the character mentioned in this section.*" (Emphasis added.)

And §95.11(3), supra, specified a five-year limitation period for actions on written contracts not under seal, the type of contract with which we are here concerned.

The Fifth Circuit Court of Appeals in its opinion and judgment, supra, 265 F. 2d 522, did not decide the question of whether §95.03 was, in fact, intended to apply to a contract of insurance issued in another state to a resident of such state, since it was of the opinion that, even if applicable, a violation of the due process clause of the federal constitution would result from invalidating the 12-month "suit clause" in the subject insurance contract. On certiorari to review such judgment a majority of the United States Supreme Court, speaking through Mr. Justice Frankfurter, held that, under settled canons of constitutional adjudication, "the constitutional issue should have been reached only if, after decision of two non-constitutional questions, decision was compelled." Accordingly, the judgment of the Court of Appeals was vacated and the cause remanded in order to secure from this court a decision on the two unresolved questions of state law now before us. Clay v. Sun Insurance Office Limited, supra.

In a dissenting opinion Mr. Justice Black, joined by the Chief Justice and Mr. Justice Douglas, argued strongly that all questions of law in the case—constitutional and non-constitutional—could properly and should be decided without further delay by the High Court; and he proceeded to do so, advancing cogent reasons in support of the applicability of §95.03 to the subject contract and its constitutionality when so applied.

We are not here concerned, of course, with the constitutionality vel non of §95.03 as applied to so-called foreign contracts, including the subject contract, since this question is not before us. In view, however, of the ruling of the Court of Appeals respecting the validity of the statute as applied to the subject contract, we have considered [fol. 158] the question of the applicability of the statute to the subject contract in the light of the well settled rule of statutory construction that a statute must be construed, if fairly possible, so as to avoid "not only the conclusion that it is unconstitutional, but also grave doubts on that score," Burr v. Florida East Coast R. R., 1919, 77 Fla. 259, 81 So.

464. Assuming arguendo that we are as sanguine as appellant insurance company that "grave doubts" should be held to exist as to the validity of §95.03 as applied to the subject contract, we must conclude, nevertheless, that it is not "fairly possible" to construe the statute as applicable solely to contracts made and executed in Florida, as here contended by appellant.

Obviously, as pointed out by the appellant, the Legislature of this state could not conceivably have any interest in a contract executed in another state by residents of other states, involving property in another state; and we agree with appellant that "Imputing any such intention to the Florida Legislature would be an absurdity." But a statute must, of course, be read in its entirety; and we think it is equally clear, from the last sentence thereof, quoted and emphasized above, that the Legislature intended the Act to apply to "any contract whatever"—foreign or domestic—when Florida's contact therewith, existing at the time of its execution or occurring thereafter, is sufficient to give a court of this state jurisdiction of a suit thereon. And, in such event, nothing could be clearer than the legislative mandate that "No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

From the facts set forth in the certified question, it is clear that this state's contact with the subject contract and parties thereto is abundantly sufficient to give a court of this state jurisdiction of a suit thereon. Accordingly, the first question certified to this court, supra, must be answered in the affirmative. This holding is in accord with the general rule stated in 29A Am. Jur., Insurance, Sec. 1794, p. 865, as follows:

> [fol. 159] " . . . [W]here the statutes of the forum make void all agreements whereby the time for the bringing of actions is fixed at a period less than that prescribed by law, a contractual stipulation made in another jurisdiction is not available as a defense."

See also Galliher v. State Mutual Life Insurance Co., 150 Ala. 543, 43 So. 833; Asel v. Order of United Commercial Travelers of America, 355 Mo. 658, 197 S. W. 2d 639; Gulf

Insurance Co. v. Holland Construction Co., 218 Ark. 405, 236 S. W. 2d 1003; and Watson v. Employers' Liability Assur. Corp., 348 U. S. 66, 99 L. Ed. 74, 75 S. Ct. 166.

The other question of state law which we are requested by the Court of Appeals to decide is stated by such court as follows:

> "(2) Does an all-risks policy of insurance containing the following provision,
>
> > 'The Company will also pay the actual loss of or damage (except by fire) to property of the Assured not specifically excluded by this Policy caused by theft or attempt thereat; or by vandalism or malicious mischief to the interior of the residences of the Assured,'
>
> and containing numerous limitations, exceptions and exclusions but none touching on acts of a spouse of an assured, cover losses resulting from acts of vandalism and from theft committed by the wife of the assured, hostile to him and without his consent, when the property damaged and taken was in the common residence of the assured and his wife?"

We have concluded that this question must also be answered in the affirmative. The policy in question, designated on its face as a "Personal Property Floater Policy (World Wide)," is an "all risk" type of insurance policy. "This type of contract has been said to cover every conceivable loss or damage that may happen except when occasioned by the wilful or fraudulent act or acts of the [fol. 160] insured." 2 Richards on Insurance (5th Ed.) §212. The appellant also points out in its brief that, in Pierce's *Development of Comprehensive Insurance for the Household*, it is said that in an "all risk" policy "it is the list of excluded causes of loss which is used to determine the true scope of the hazard coverage."

Clearly, then, in the absence of a provision expressly excluding from coverage loss caused by vandalism or theft on the part of the wife of the insured, and under the rule that an insurance policy must be liberally construed in favor of

the insured, National Surety Co. v. Williams, 74 Fla. 446, 77 So. 212, it should be held that the loss here sustained is within the coverage of an "all risk" policy.

But, argues the appellant, the subject policy was a "family policy," insuring all the family property, some joint and some individually owned, and should be construed "to cover only against 'risks,' and not against deliberate acts by one of the persons insured . . ." The short answer to this contention is that the acts of vandalism and theft committed by the wife, in the husband's absence from their common residence and without his consent, involved property owned by the husband alone, and that the wife would be criminally liable for her actions in this respect under the decision of this court in State v. Herndon, 1946, 158 Fla. 115, 27 So. 2d 833; and that the husband alone, and not the wife, was a party to the subject contract of insurance.

These circumstances, and the rule of the National Surety Co. case, and numerous others, noted above, require a finding that the loss here sustained is within the coverage of the subject "all risk" policy; and we so hold.

At the risk of unduly lengthening this opinion, we deem it appropriate to note that we have also considered, sua sponte, the question of our jurisdiction constitutionally to entertain the subject proceeding under the authority to do so contained in §25.031, Fla. Stat., and Florida Appellate Rule [fol. 161] 4.61, providing respectively as follows:

> "25.031 Supreme court authorized to receive and answer certificates as to state law from federal appellate courts.—The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions con-

cerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer."

and Rule 4.61 (Florida Appellate Rules):

"a. When Certified. When it shall appear to the Supreme Court of the United States, or to any of the Courts of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal appellate court may certify such questions or propositions of law of this State to the Supreme Court of Florida for instructions concerning such questions or propositions of state law.

"b. Jurisdiction. Questions or propositions of law referred to in sub-paragraph a hereof shall be certified for answer to the Supreme Court of this State.

[fol. 162] "c. Method of Invoking Rule. The provisions of this rule may be invoked by any of the federal courts referred to in sub-paragraph a hereof upon its own motion or upon the suggestion or motion of any interested party when approved by such federal court.

"d. Contents of Certificate. The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

"e. Preparation of Certificate. The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of said federal court, it shall be certified to the Supreme Court by the clerk of the federal court and under its official seal. The Supreme Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such

record may be necessary in the determination of said cause.

"f. Costs of Certificate. The costs of the certificate and filing fee shall be equally divided between the parties unless otherwise ordered by this Court.

"g. Briefs and Argument. The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within thirty days after the filing of said certificate in the appellate court of this State having jurisdiction. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within twenty days after the receipt of appellant's or moving party's brief and a reply brief shall be filed within ten days thereafter.

[fol. 163] "h. Oral Argument. Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the Court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits."

We have requested briefs from the parties on this question. We are indebted also to amicus curiae, the Honorable Fred M. Burns, Assistant Attorney General of this State, who held such post in 1945 at the time the legislation now appearing as §25.031 was conceived, drafted and enacted into law, for the history of this legislation and an exhaustive brief on the question of its validity.

Section 25.031 was enacted as §1 of Ch. 23098, Acts of 1945, prior to the adoption in 1956 of the Revised Judiciary Article which, among other things, provides:

"Section 3. *Practice and procedure.*—The practice and procedure in all courts shall be governed by rules adopted by the supreme court." Art. V, Constitution of Florida.

The statute authorized this court to provide, by rule of court, for the certification to it by federal appellate courts

of questions of state law determinative of a cause pending in a federal court, "which certificate the supreme court of this state, by written opinion, may answer." Rule 4.61 of the Florida Appellate Rules was adopted by this Court "pursuant to the power vested in this Court under Article V of the Florida Constitution to adopt rules governing the practice and procedure in all courts of this State . . ." In Re: Florida Appellate Rules, opinion filed March 1, 1961. The Rule re-stated the provisions of the statute and added details relating to the form and content of the certificate. Its adoption was a valid exercise of our organic power and provided a procedure for assisting, in a spirit of comity, the Federal Appellate system in questions of state jurisprudence, no other forum for so doing having been established by the laws of Florida.

[fol. 164] It is obvious, therefore, that we need not concern ourselves with the question of whether this court derives its authority to entertain the subject proceeding from the statute or from the rule since, in either case, we have it. Cf. State v. Furen, Fla. 1960, 118 So. 2d 6.

The real question here is whether §4 of Revised Article V of our Constitution, adopted in 1956, which delineates the appellate jurisdiction of this court and provides for the issuance by it of named writs, should be construed as prohibiting this court from exercising any judicial powers other than those expressly provided for therein. Some doubt as to whether we may constitutionally exercise the judicial power attempted to be conferred by §25.031 and Rule 4.61 has been generated by the language of this court in City of Dunedin v. Bense, Fla. 1956, 90 So. 2d 300, at page 302, as follows:

> "The orbit within which the Supreme Court must function was well defined in State ex rel. Watson v. Lee, 150 Fla. 496, 8 So. 2d 19. We there held that jurisdiction of the Supreme Court is conferred by the Constitution itself. It is not endowed with any common-law prerogative outside of the boundaries established by organic law. Certainly, the appellate jurisdiction is clearly defined. Its original jurisdiction is stated with equal clarity. The ancillary constitutional writs referred to as those 'necessary or proper to the complete

> exercise of its jurisdiction' are writs which are incidental to the jurisdiction either appellate or original otherwise delineated by the Constitution. If the last quoted provision were extended beyond this scope, then obviously by the simple process of passing a law, the Legislature could expand the original jurisdiction of the Supreme Court to an illimitable degree . . . . "

[fol. 165] It should be noted that in the City of Dunedin case the court was considering a statute attempting to vest in this court original jurisdiction to issue a writ of injunction—a writ not listed among those which the constitution, in §4 of Article 5, expressly enumerates. Moreover, as pointed out by this court in its opinion in that case, the statute would "empower this court to encroach upon the nisi prius jurisdiction of the Circuit Courts which, according to Section 6, Article V, of the Constitution, 'shall have exclusive original jurisdiction in all cases in equity. . . .'" When read in context and in the light of ancient and well settled principles of law, the City of Dunedin case does not appear to be controlling here.

Thus, there is no question but that state constitutions are in no manner grants of power, as is the federal constitution, but are limitations upon the power of the state legislature. *All power not limited by a state constitution inheres in the people of that state.* The cases so holding are legion. See also 6 Fla. Jur. 298, §37, stating:

> "Although the Federal Constitution bestows power only in specific grants and is a document of delegated powers, the Florida Constitution is a limitation on power as distinguished from a grant of power, particularly with regard to legislative power."

"'It is a fundamental principle of constitutional law that each department of government, whether federal or state, "has without any express grant, the inherent right to accomplish all *objects naturally within the orbit of that department*, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution." 1 Andrews' American Law (2d ed.)

Sec. 182, p. 221.' In Matter of Richards, 333 Mo. 907, 63 S. W. 2d 672, 675." Re Integration of Nebraska State Bar Association, 133 Neb. 283, 1937, 275 N. W. 265, 114 A.L.R. 151. Accord: In re: Petition of Florida State Bar Ass'n, Fla. 1949, 40 So. 2d 902.

[fol. 166] With respect to legislation involving the judicial power inherent in the state, it has been many times held by this court that, while the Legislature cannot restrict or take away jurisdiction conferred by the constitution, constitutional jurisdiction "can be enlarged by the Legislature in all cases where such enlargement does not result in a diminution of constitutional jurisdiction of some other court, or where such enlargement is not forbidden by the constitution." Chapman v. Reddick, 41 Fla. 120, 25 So. 673, at page 677. Accord: Harry E. Prettyman, Inc. v. Florida Real Estate Commission, 92 Fla. 515; 109 So. 442, 445; South Atlantic Steamship Co. v. Tutson, 139 Fla. 405, 190 So. 675, 681; Pournelle v. Baxter, 142 Fla. 517, 195 So. 163.

It is now well established procedure for a federal court to abstain from deciding the merits of a case so as to afford the state courts a reasonable opportunity to construe a state statute involved in the case. As stated in Harrison v. N.A.A.C.P., 360 U. S. 167, 79 Sup. Ct. 1025, 3 L. Ed. (2d) 1152

> "This now well established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts,' Matthews v. Rodgers, 284 U.S. 521 . . ., as their 'contribution . . . in furthering the harmonious relation between state and federal authority. . . .' Railroad Com. v. Pullman Co., 312 U.S. 496."

[fol. 167] And statutes such as §25.031—enacted by the Florida Legislature "with rare foresight," to borrow Mr. Justice Frankfurter's words describing its action in this

respect—cannot help but contribute substantially to the salutary policy quoted above, since such statutes would provide a vastly more expeditious method of securing an authoritative decision by the court of last resort of a state on a doubtful question of state law than does the declaratory judgment procedure, the route frequently followed in such cases. See Harrison v. N.A.A.C.P., supra; Allegheny County v. Mashuda Co., 360 U. S. 185, 79 Sup. Ct. 1060, 3 L. Ed. (2d) 1163; cf. Meredith v. Winter Haven, 320 U. S. 228, 64 Sup. Ct. 7, 88 L. Ed. 9.

We have concluded that, in the absence of a constitutional provision expressly or by necessary implication limiting the jurisdiction of the Supreme Court to those matters expressly conferred upon it, *and in the absence of a constitutional provision expressly conferring upon another court jurisdiction to exercise the judicial power* which is the subject matter of §25.031 and Rule 4.61, and in the light of the well settled rule that all sovereign power, including the judicial power, "not limited by a state constitution inheres to the people of [the] state," such power may be granted to this court by statute if it is deemed to be a substantive matter, or by a rule of this court if it is deemed to be a matter of "practice and procedure," cf. State v. Furen, supra, 118 So. 2d 6. It follows that this court, having in the background derived authority both by statute prior to 1956 and by rule of court subsequent to the 1956 organic revision above referred to, may entertain the subject certificate.

Accordingly, the questions are within the contemplation of Florida Appellate Rule 4.61 and both are answered in the affirmative as hereinabove set forth.

It is so ordered.

Terrell, Thomas, Hobson, Drew, Thornal and O'Connell, JJ., concur.

[fol. 169]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17525

SUN INSURANCE OFFICE, LIMITED, Appellant,

vs.

JOHN CLAY, Appellee.

Appeal From the United States District Court for The Southern District of Florida.

OPINION—June 19, 1963

Before Jones and Bell, Circuit Judges, and Estes, District Judge.

Jones, Circuit Judge: By this opinion this Court writes another chapter, perhaps not the final one, in this litigation which commenced more than six years ago and has commanded the attention of four courts.

The appellee, John Clay, procured a personal property floater policy of insurance from the appellant, Sun Insurance Office, Limited. The policy was issued in 1952 in [fol. 170] Illinois where Clay was then living. Clay moved to Florida. The policy contained a suit clause which provided that no action could be maintained unless commenced within twelve months after the discovery of the loss, with a proviso that if the limitation was invalid under the law of the state in which the policy was issued, then suit must be brought within the shortest time permitted by the law of that state. The suit clause was valid in Illinois. A Florida statute declared such provision contrary to the public policy of the state and to be illegal and void, and directed that no court in the state should give effect to any such contract provision. In the winter of 1954-1955 property of Clay, covered by the policy, was deliberately

destroyed by Clay's wife. The loss was reported to Sun on February 1, 1955, and it denied liability on April 1, 1955.

On May 20, 1957, Clay brought an action on the policy against Sun in the District Court for the Southern District of Florida, basing jurisdiction on diversity of citizenship. Sun asserted two defenses, that the action was not brought within the time limited by the suit clause, and that the policy did not cover losses willfully caused by the spouse of the insured. The district court entered judgment for Clay on a jury verdict for $6,800. On appeal, this Court declined "to make the difficult guess as to what the Florida state courts might decide if they were presented with" the issue as to whether the Florida statute applies to a contract such as was before it. This Court held that constitutional due process requirements precluded Florida from applying its statute to the contract made in Illinois. *Sun Insurance Office, Limited* v. *Clay*, 5th Cir. 1959, 265 F. 2d 522. Reliance was placed by this Court, in reaching its decision, upon *Home Insurance Co.* v. *Dick*, 281 U. S. [fol. 171] 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701, and *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928.

The Supreme Court reversed this Court's decision. *Clay* v. *Sun Insurance Office, Limited*, 363 U. S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170. The Supreme Court concluded that the Dick and Delta & Pine cases were not conclusive on the constitutional issue. Therefore, said the Court, a decision should have been first made as to whether, under Florida law, the Florida statute is applicable and whether the losses resulting from the wife's conduct were within the policy coverage, since the disposition of one or both of these questions might avoid the constitutional question. The Supreme Court, in closing its opinion, commented upon the observation of this Court as to the difficulties of making "a confident guess" as to how the Florida Supreme Court would construe the Florida statute. Following that comment and in concluding its opinion, the Supreme Court said:

"The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision. Fla. Stat. Ann. 1957, § 25.031. Even without such a facilitating statute we have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law. See Al-[fol. 172] legheny County v. Mashuda Co., 360 U. S. 185, 189, and cases cited; see also Meredith v. Winter Haven, 320 U. S. 228, 336." 363 U. S. 207, 212.

On August 12, 1960, this Court, "pursuant to the opinion and mandate[1] of the Supreme Court," certified the two questions[2] to the Supreme Court of Florida. On March 1, 1961, the Supreme Court of Florida adopted a rule relating to Certified Questions from Federal Courts. In Re Florida Appellate Rules, 127 So. 2d 444. On October 18, 1961, the Supreme Court of Florida rendered an opinion. *Sun Insurance Office, Limited* v. *Clay*, Fla., 133 So. 2d 735.

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[1] It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Fifth Circuit for proceedings in conformity with the opinion of this Court.

[2] (1) Are the provisions of Sections 95.03 and 95.11(3), Florida Statutes, making void any provisions of an insurance contract requiring suit on the contract to be filed in a period shorter than five years applicable to [the policy here in suit under the facts here presented]?

(2) Does an all-risks policy of insurance containing the following provision,

"The Company will also pay the actual loss of or damage (except by fire) to property of the assured not specifically excluded by this Policy caused by theft or attempt thereat; or by vandalism or malicious mischief to the interior of the residences of the Assured;

. . . cover losses resulting from acts of vandalism and from theft committed by the wife of the assured, hostile to him and without his consent, when the property damaged and taken was in the common residence of the assured and his wife?

We have a doubt as to the effect to be given to the recital in the Supreme Court's Clay-Sun Insurance Office opinion that the Florida Legislature "has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation." The citation to *Allegheny* [fol. 173] *County* v. *Mashuda Co.*, 360 U. S. 185, 189, 79 S. Ct. 1060, 3 L. Ed. 2d 1163, would permit an inference that a use of the Florida certification statute was an invocation of abstention or the equivalent of it. But abstention, as we understand the doctrine, is a remitting of the parties in a pending federal court action to a state court for a decision of a question of state law with a determination of the other issues by the federal court; or, upon the election of the party remitted to the state court, for a complete and final adjudication by that court of the entire controversy. *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 427, 83 S. Ct. 328, 9 L. Ed. 2d 405.

We do not think the Supreme Court intended, by the recital to which we have referred, to treat the opinion of the Florida court as constituting a binding determination which became the law of the case and res judicata such as would, we believe, have been true if the parties had been remitted to the state court and it had made an adjudication in litigation inter parties during a federal court abstention. The Florida certification statute does not require nor, we think, does it contemplate that the parties in the federal litigation shall submit themselves to the jurisdiction of the state court. The rule of the Florida Supreme Court purports to require briefs and permits oral argument. The power of the federal court to make a determination of the litigable issues between the parties to the pending cause was neither transferred to nor shared with the state court. The Supreme Court of Florida has, it seems, original jurisdiction only in the issuance of extraordinary writs. Fla. Const. Art. V, Sec. 4(2); *City of Dunedin* v. *Bense*, Fla., 90 So. 2d 300.

We need not determine whether the opinion of the Florida Supreme Court, given in answer to the questions certi- [fol. 174] fied to it by this Court, is merely advisory and entitled, like dicta, to be given persuasive but not binding

effect as a precedent,[3] or is to be credited under Erie-Tompkins[4] doctrine and the rule of stare decisis as though it were the ratio decidendi of a decision made in adversary litigation before the court. A Florida District Court of Appeal has followed[5] the opinion of the Supreme Court of Florida. This Court, being "in effect, only another court of the State"[6] in a diversity action, is required to follow the opinion in its statements as to Florida law. As to the law of the United States, and particularly with respect to constitutional issues, the Florida court's views are without binding effect.

After a recital of the rule that insurance contracts are to be liberally construed in favor of the insured, the Florida court stated that the husband was covered against the willful destruction of property by his wife. The parties, on oral argument, have conceded that this is a correct statement of the law of Florida. We accept it as such.

We find the Florida court's pronouncements on the other submitted question more troublesome. In rendering an answer to the question as to whether the Florida statute is [fol. 175] applicable to the suit clause of the policy under the facts recited, the Florida court, at the outset, expressed agreement with the contention of the insurer that it would be absurd to impute to the Florida Legislature any intention of asserting an interest in a contract executed in another state by residents of other states involving property in another state. Thus, it seems to have been recognized that there might be circumstances under which

[3] Lee v. Dowda, 155 Fla. 68, 19 So. 2d 570; Myers v. Atlantic Coast Line Railroad Co., Fla. 112 So. 2d 263; State v. Florida State Improvement Commission, Fla., 60 So. 2d 747; Pell v. State, 97 Fla. 550, 112 So. 110.

[4] Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487.

[5] Schluter v. National Union Fire Insurance Co., Fla., 144 So. 2d 95.

[6] Guaranty Trust Co. v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A.L.R. 1231; King v. United Commercial Travelers, 333 U. S. 153, 68 S. Ct. 488, 92 L. Ed. 608, reh. den. 333 U. S. 878, 68 S. Ct. 900, 92 L. Ed. 1153, Cf. Comment, Robertson, Inter-Sovereign Certification as an Answer to the Abstention Problem, 21 Law., L.R. 777; Nieto, The Abstention Doctrine, 40 Denver L.C.J. 45.

Florida courts would give effect to a suit clause in an insurance contract. But, said the Florida court, it is clear "that the legislature intended the act to apply to 'any contract whatever'—foreign or domestic—when Florida's contract therewith, existing at the time of its execution or occurring thereafter, is sufficient to give a court of this state jurisdiction of a suit thereon." 133 So. 2d 735, 738. The Florida court concluded that Florida's contact with the contract and the parties was sufficient to give a Florida court jurisdiction of a suit thereon. "Accordingly", said the Florida court, "the first question certified to this court, supra, must be answered in the affirmative."

If, as the Florida court says, the application of the statute to invalidate the suit clause depends upon whether the Florida court would have jurisdiction of a suit on the policy, then of course the affirmative answer was required. It is a general principle that an action on an insurance policy seeking a money judgment is a transitory action which may be brought wherever service of process can be had on the defendant. *Confederation of Canada Life Insurance Company* v. *Vega Y Arminan*, Fla., 135 So. 2d 867, cert. den. 144 So. 2d 805. If, as the Florida court has intimated, the ability to serve the insurance company with process is the Florida test for determining whether the [fol. 176] law of the forum will be applied in ascertaining the enforceability of policy clauses which are valid where the contract is made, a novel doctrine has been announced. We do not think it was intended by the Florida court to make the application of the statute in a given case dependent upon jurisdiction of the court over the parties and the subject matter in an action on the policy. It is difficult to see how the statute could be applied and an effective judgment rendered if there were no jurisdiction of the parties and subject matter.[7] Rather than attribute to the Florida court a literal meaning to the language it used, we think it intended to do no more than to declare that if the State of Florida had such significant contacts with the factual phases of the litigation as to give it a paramount

[7] But see Schluter v. National Union Fire Insurance Co., *supra*, where jurisdiction was said to be the test of the applicability of the statute.

interest in the control of the governing legal rules, then its invalidating statute would be applied. If the surmise which we have made, and we must make one, as to the meaning of the Florida court's statement of Florida law is a correct one, then it must be apparent that the court was persuaded of the existence of the required significant contacts in this case.

It seems improbable that a question would be certified to the Florida Supreme Court unless, at the time the question was certified, the federal court intended to accept the answer as "authoritatively determining" the law of the state. But if the statement of a rule of Florida law so made is based upon an erroneous concept of a principle of constitutional law, then we think we are required to examine [fol. 177] its opinion in the light of constitutional doctrines as they are understood by us.

The Florida Supreme Court, in its Clay opinion, stated that it was not "concerned, of course with the constitutionality vel non of [the Florida statute] as applied to so called foreign contracts, including the subject contract," since the question was not before it. The reason given by the Florida court for the answer returned is that significant contacts of Florida with the policy of insurance and the cause of action upon it had been shown and therefore the statute would be applied to invalidate the policy provision. In other words, it seems to us that the Florida court has said that because of the contacts, which it found to be significant, there is no due process requirement of permitting a defense under the suit clause of the insurance contract.

We are unable to separate the significant contact test from the constitutional due process question. The question of due process is a federal question. Whatever else might be said about an opinion of the Florida Supreme Court in response to a certified question from this Court, it seems certain that its conclusion as to a Federal constitutional question or its premise from which it reaches such conclusion are not binding upon us as the law of the case, res judicata, stare decisis, or otherwise. We are of the view that we can and must decide whether there are here the significant contacts upon which the application of the Florida statute depends. This we think we must do uncontrolled by the Florida court's opinion and uninfluenced

by what it has said except as we are persuaded by such [fol. 178] logic as is to be found in its reasoning and the weight of any precedents which may support it.

Prior to this case there had been two decisions where the effect of the Florida statute had been considered. One of these, by the Supreme Court of Florida, held that the delivery of an insurance certificate in Florida made the contract subject to Florida law, including the statute making void contract clauses reducing the statutory limitation for bringing suits. *Sovereign Camp, Woodmen of the World*, v. *Mixon*, 79 Fla. 420, 84 So. 171. The inference can be urged that had the certificate been issued in a state where there was no invalidating statute, the suit clause could have been successfully interposed as a defense. The other case was decided by the United States District Court for the Southern District of Florida. *Holderness* v. *Hamilton Fire Ins. Co.*, 54 F. Supp. 145. It was there held that the Florida statute could not be asserted to bar a suit clause defense in an action on a fire policy issued in North Carolina upon a building in North Carolina where the clause was valid. The law of Florida, as declared in these two cases, has been thus stated:

> "Stipulations in an insurance policy shortening the period within which suits must be instituted under it to a period less than that provided by the statute of limitations are illegal and void under the statutes of this state. This rule applies to contracts made outside the state, if delivery of the policy is made in the state by a local agent so as to make the contract subject to Florida law. But there is an important qualification. If the stipulation limiting the period during which [fol. 179] action may be brought under a policy is valid by the law of the state where the contract was executed and is to be performed, that stipulation will be recognized in Florida as a defense, though the court will not affirmatively enforce performance in such cases." 18 Fla. Jur. 300, Insurance § 406.

Subsequent to the opinion of the Florida Supreme Court in the Clay matter and to the opinion of the Florida Dis-

trict Court of Appeal in the Schluter case, another Florida Court of Appeal decision was rendered. It did not involve the particular Florida statute which is here before us, but consideration was given to the Florida law with respect to contractually created defenses to actions which are or may be invalid under the law of the forum. The "significant contacts" rule was recognized and applied. The court said:

> "When a suit is brought on a contract in a jurisdiction other than the one which governs the rights and obligations thereunder, a defense lawfully vested under the law of the latter jurisdiction may not be ignored by the forum if that state had no significant connection with the contract obligations. Rejection of such rights under the contract, asserted as a defense, is a deprivation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and Section 12 of the Declaration of Rights of Florida." Confederation Life Association v. Ugalde, Fla. 151 So. 2d 315, 318.

The court, in the Ugalde case, gave approval to the Holderness decision and to the former opinion of this Court in [fol. 180] *Sun Insurance Office* v. *Clay*. The court also cited with approval the Dick case and the Delta and Pine case upon which this Court relied in its former opinion in this case.

The presence or absence of the significant contacts is, we think, the determinant of constitutional due process. *Watson* v. *Employers Liability Corporation*, 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 74. In its former opinion, as has been earlier noted, this Court was guided by the principles stated in the Dick case and in the Delta and Pine case, supra. Our further consideration of the constitutional issue has left us convinced that the reasoning of the former opinion of this Court is sound. It is our view that the decision previously made was correct and that we should adhere to it. The doctrine of the Dick and Delta and Pine cases which was set forth in this Court's former opinion and there regarded as controlling is still believed by us to be the governing principle upon which the case should be decided. We cannot find that the rule of these precedents

has been overruled or modified. The Supreme Court has referred to them in terms of approval. *United Commercial Travelers* v. *Wolfe*, 331 U. S. 586, 67 S. Ct. 1355, 91 L. Ed. 1687, 173 A.L.R. 1107. It is urged that *Watson* v. *Employers Liability Assurance Corporation*, 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 74, requires a different conclusion. We are not so persuaded.

The Watson opinion, commenting on the Delta & Pine case, noted that the activities of Mississippi, the state of the forum, in connection with the policy were so slight and so casual that Mississippi could not apply its own law in such a way as to enlarge the obligations of a contract validly created under the law of another state. In the Delta and Pine case a Connecticut insurance company had [fol. 181] entered into a fidelity bond in Tennessee insuring a Tennessee corporation against loss resulting from dishonesty of employees. A condition of the contract required all claims to be filed within fifteen months from the termination of the contract. A Mississippi statute provided that statutes of limitation could not be altered by private agreement. An employee of the insured corporation defaulted. No claim was made within the fifteen-month period. The Mississippi court held the contract provision invalid and allowed recovery. The Supreme Court, by a unanimous decision, reversed. The local contacts of Florida, in the case before us, are certainly no more, and in our view are less, than in the Delta and Pine case. We are, we believe, required to follow it.

In the Ugalde case, supra, the policy was issued by a Canadian insurance company in Cuba to a Cuban resident who came to the State of Florida and there demanded payment of the cash surrender value of the policy in United States dollars in accordance with the terms of the policy. It was held that there were no such significant Florida contacts as prevented the Florida courts from applying a Cuban law which required payment in Cuban currency. This Court has held that the law of Illinois controlled in an action on a life insurance policy issued in Illinois on which a diversity suit was brought in Florida after the removal to and death of the insured in Florida. *Mutual Life Insurance Co. of New York* v. *Hess*, 5th Cir. 1947, 161

F. 2d 1; *In re Mutual Life Insurance Co. of New York*, 5th Cir. 1951, 188 F. 2d 424. In the earlier decision of this Court in this cause it was held that the State of Florida did not have sufficient contacts to deprive the insurer of its defense under the suit clause. 265 F. 2d 522, 526. This [fol. 182] holding is probably not the law of the case in view of the Supreme Court's remand. It is, however, in our opinion, a sound conclusion which should be restated and reaffirmed. We therefore decide, as was before decided, that the district court erred in failing to sustain the appellant's defense to the action. The judgment of the district court will be reversed and the cause remanded for the entry of a judgment for the appellant.

Reversed and Remanded.

[fol. 183]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 17,525

D. C. Docket No. 7608-M-Civil

SUN INSURANCE OFFICE, LIMITED, Appellant,

versus

JOHN CLAY, Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before Jones and Bell, Circuit Judges, and Estes, District Judge.

JUDGMENT—June 19, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court for the entry of a judgment for the appellant;

It is further ordered and adjudged that the appellee, John Clay, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate: Aug 1 1963

Recoverable Costs:

Docketing Cause, Etc. $25.00

[fol. 184] Clerk's Certificate (omitted in printing).

[fol. 185]

SUPREME COURT OF THE UNITED STATES

No. 470, October Term, 1963

JOHN CLAY, Petitioner,

vs.

SUN INSURANCE OFFICE, LIMITED

ORDER ALLOWING CERTIORARI—December 2, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.